No. 2423

United States

Circuit Court of Appeals

For the Ninth Circuit.

NORTHWESTERN LUMBER COMPANY, a Corporation,

Appellant,

vs.

GRAYS HARBOR & PUGET SOUND RAILWAY COMPANY, a Corporation, OREGON AND WASHINGTON RAILROAD COMPANY, a Corporation, OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation, and CHICAGO, MILWAUKEE & PUGET SOUND RAILWAY COMPANY, a Corporation,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filmer Bros. Co. Print. 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Solicitors.

BENJAMIN S. GROSSCUP, Esquire, #411 Bank of California Building, Tacoma, Washington, and

W. CARR MORROW, Esquire, #411 Bank of California Building, Tacoma, Washington,

Solicitors for Complainant and Appellant.

W. H. BOGLE, Esquire, #609–16 Central Building, Seattle, Washington;

CARROLL B. GRAVES, Esquire, #609–16 Central Building, Seattle, Washington;

F. T. MERRITT, Esquire, #609–16 Central Building, Seattle, Washington; and

LAWRENCE BOGLE, Esquire, #609–16 Central Building, Seattle, Washington,

Solicitors for Respondents and Appellees.

Bill in Equity for Specific Performance.

To the Judges of the Circuit Court of the United States for the Western District of Washington:

The Northwestern Lumber Company, a corporation now, and at all times hereinafter mentioned, organized and existing under the laws of the State of California and a citizen of said State of California, brings this its bill, against Grays Harbor and Puget Sound Railway Company, now and at all times hereinafter mentioned, a corporation organized and existing under the laws of the State of Washington and a citizen of said State, Oregon and Washington Railroad Company, a corporation now, and at all times hereinafter mentioned, organized and existing under

the laws of the State of Oregon and a citizen of said State, Oregon-Washington Railroad and Navigation Company, now and at all times hereinafter mentioned, a corporation organized and existing under the laws of the State of Oregon and a citizen of said State, and the Chicago, Milwaukee and Puget Sound Railway Company, now and at all times hereinafter mentioned, a corporation organized and existing under the laws of the State of Washington, for its bill of complaint says as follows:

I.

Your orator is a corporation, and at all times since prior to the year 1908 has been a corporation duly organized and existing under and by virtue of the laws of the State of California and a citizen of said State, and at all said times has been in active business in the State of Washington as a foreign corporation, having at all times complied with the laws of the State of Washington, relating to foreign corporations, and having paid its annual license [1*] fee as provided by law, at all times required for said payment, and your orator is a citizen of the State of California.

II.

The defendant Grays Harbor and Puget Sound Railway Company was incorporated under the laws of the State of Washington, prior to the month of October, 1908, and has at all times since existed as a corporation under the laws of said State, and is a citizen of said State of Washington; said defendant for brevity will hereafter in this bill be designated

*Page number appearing at foot of page of original certified Record.

Grays Harbor Company. Oregon and Washington Railroad Company was, prior to the month of October, 1908, duly incorporated under the laws of the State of Oregon, and has ever since existed as a corporation under the laws of said State, and is a citizen of said State of Oregon; said corporation has, as your orator believes, ever since the date of its incorporation, transacted business in said State of Washington, under and by virtue of the laws of said State of Washington relating to foreign corporations; said corporations will hereafter in this bill, for brevity, be called Oregon Company. Defendant Oregon-Washington Railroad and Navigation Company was, on or about the first of December, 1910, incorporated under the laws of the State of Oregon, and has ever since been doing business under the laws of the said State of Oregon, and has engaged in business in the State of Washington, by virtue of the incorporation laws of said State of Washington, and is a citizen of the State of Oregon. Said corporation will hereafter in this bill, for brevity, be called Navigation Company. The defendant Chicago, Milwaukee and Puget Sound Railway Company was incorporated under the laws of the State of Washington, prior to June 27th, 1910, and [2] has ever since existed under the laws of the State of Washington, and is a citizen of the State of Washington. Said corporation will, for brevity, hereafter in this bill be called Milwaukee Company.

III.

In the year 1908, and prior to the month of October, in said year, the Grays Harbor Company, by

virtue of its charter of incorporation and the resolution of its trustees, began the construction of the line of railway extending from the city of Centralia, in Lewis County, Washington, to and into the city of Hoquiam, in Chehalis County, Washington, together with facilities for handling freight and passengers, with such buildings, structures and appliances, as are usual and ordinarily incidental thereto. For the purpose of securing the necessary land, rights of way and other property, together with other duties, they employed one H. F. Baldwin, under the title of Chief Engineer, and authorized said H. F. Baldwin to contract for property necessary and useful for the carrying out of said purposes; said H. F. Baldwin, in pursuance of his duties, and acting for the said Grays Harbor Company, opened negotiations with the complainant, Northwestern Lumber Company, for the purchase of certain lands, rights of way and facilities in the city of Hoquiam, and in the course of said negotiations submitted to the complainant a map of part of said city, on which map was drawn and indicated certain properties under consideration of the parties in connection with said negotiations. Thereafter, as a result of said negotiations and in pursuance thereof, and at the request of the said Grays Harbor Company, made through said Baldwin, its agent, the complainant, [3] Northwestern Lumber Company, submitted to said Baldwin, acting as agent aforesaid, in writing, a proposition in words and figures as follows:

"September 25, 1908.

Mr. H. F. Baldwin,
Burke Building,
Seattle, Wash.

Dear Sir:—

We have found it necessary to make some changes in the schedules left with us yesterday, such as, for instance, in Block 59 your requirements showed Lots 13 & 14. On these we have quoted right of way only, as we should object very seriously to anything in the nature of a round-house or watering-place in such close proximity to our buildings. If this is required for some purpose other than that we will make you a price on it. At present it is occupied by our stable, and right of way could be granted without entirly destroying it for that purpose.

'Railroad Avenue Line,' which contemplates station on Lots 1 & 2, Tract 4, Plate 5, Hoquiam Tide & Shore Lands, we make you the following specifications in price;

Through our shingle-mill boom to Railroad Avenue, as shown on your map, not to cut our dry kiln or shed, on the South side of Railroad Avenue, you to build with a 40-foot span at log boom;

A 25-foot right of way through Block 70 on West side of Northern Pacific and adjoining Northern Pacific right of way;

60x150 feet on Levee Street, in Block 62, and a 25-foot right of way to replace right of way in Levee Street, we to remove the buildings;

A 25-foot right of way to replace area used in

Levee [4] Street, Block 61, we to remove buildings;

A 25-foot right of way for eighty-eight feet in Block 51, to replace right of way used in Levee Street, we to remove buildings;

A 25-foot right of way to replace area used in Levee Street, Block 50, we to remove buildings;

A 25-foot right of way, Block 38, Lots 15 & 16;

A 25-foot right of way next to the Northern Pacific, Block 69, we to remove buildings.

A 25-foot right of way along Twelfth Street vacated, now Lot 3, Tract 15, Plate 9, Hoquiam Tide & Shore Lands, to K Street, on the North side of the Northern Pacific track, all for the sum of $66,000.00, Sixty-six Thousand Dollars.

'River Avenue Line,' which contemplates depot on the East side of the river.

Right of way through Blocks 38, 50, 51, 61, 62, 70, 69,, and Lots 3, Track 15, Plate 9, to K Street, as mentioned in Railroad Avenue Line proposition herewith, all for the sum of $62,000.00 Sixty-two Thousand Dollars.

'Simpson Avenue Line,' with depot grounds in Block 50.

Across Northwestern Lumber Company's log pocket on the extension of Simpson Avenue, which is across Lot 1 of Tract 15, Plate 9, Hoquiam Tide & Shore Lands; thence across or along Levee Street, adjacent to Blocks 70, 62, 61, *eight*-eight feet in Block 51 and two hundred and fifty feet, eleven inches, in Block 50, together with the return right of way through Blocks 62, 70 & 69, joining Northern Pacific

right of way through those blocks and through Lot 3, Tract 15, Plate 9, to Railroad Avenue along Twelfth Street vacated and adjoining Northern Pacific track, to K Street. This [5] right of way to be adequate for double trackage except on its return or switch track through Blocks 70, 69 and Twelfth Street. Also to include for depot grounds the East 182 feet of Block 50, all for the sum of $102,000.00, One Hundred Two Thousand Dollars.

'Emerson's proposition.' The same as Simpson Avenue Line, omitting depot grounds in Block 50 and adding the East half of Blocks 62 & 61 and eighty-eight feet on Levee Street by 100 feet in Block 51, you to join with the Northwestern Lumber Company dedicating 50-foot street along the center line of Blocks 61 & 62, for the sum of One Hundred Thirty-four Thousand Dollars ($134,000.00).

Yours truly,
NORTHWESTERN LUMBER COMPANY,
GEORGE H. EMERSON,
Vice-President."

IV.

Thereafter the said defendant, the Grays Harbor Company, having considered the said several alternative propositions embraced in said letter, accepted the proposition therein contained and understood by the parties, and each of them, respectively, and styled by them the "Emerson Proposition," which acceptance was in writing and in words and figures following, to wit:

"June 9th, 1909.

Northwestern Lumber Company,
Hoquiam, Wash.

Gentlemen:

We beg to advise you that we accept what is called **[6]** the 'Emerson' proposition, contained in your letter to Mr. H. F. Baldwin dated September 25th, 1908, being your proposition for One Hundred and *Thirty-four* ($134,000) *Dollars.*

We will present you a map showing in detail such proposition and a formal agreement shall be entered into, pending actual transfers.

However, we will expect and you shall give us your co-operation in procuring other properties in Hoquiam and also franchises in Hoquiam.

You shall without delay furnish our attorneys with abstracts of title and our attorneys shall have twenty (20) days after delivery of abstracts within which to examine same, and upon our attorneys passing title, and delivery by you to us of proper deeds of warranty to such property, we will pay you the aforesaid sum. All buildings to be removed by you within six months from date of deed.

THE GRAYS HARBOR & PUGET SOUND RY. CO.

By H. F. BALDWIN.

We accept the foregoing proposition.

THE NORTHWESTERN LUMBER COMPANY,

By C. H. JONES,
Prest."

Said Baldwin, acting for the said Grays Harbor Company, as a part of the said acceptance and im-

mediately after the delivery thereof, substituted for the map which was before the parties during their negotiations hereinbefore recited a clean map showing in detail the land, rights of ways and the properties covered by the said agreement, and showing the land intended to be conveyed thereunder, a copy of which map is hereto attached to this bill and made a part hereof, [7] marked Exhibit "A."

V.

On June 10, 1909, in pursuance of the agreement entered into between the complainant and the defendant, the Grays Harbor Company, complainant ordered abstracts of title covering the lands described in said agreement, which abstracts, at the request of the said Grays Harbor Company, were delivered on June 12th, 1909, to J. B. Bridges, attorney for said company at Aberdeen, Washington. Said abstracts disclosed the power of the complainant, Northwestern Lumber Company, to convey a clear and unencumbered title to said property and each and every parcel thereof. It was understood at said time that the record title to one or more parcels included in said contract stood in the name of other parties, but that the complainant had power to contract for the sale of such parcels, and was able to deliver clear title thereto, and conveyance from said parties holding the record title have since been made, so that at all times since said agreement complainant, Northwestern Lumber Company, has been able and willing to make full, clear and unencumbered title to each and all of said land and

each and every parcel thereof.

VI.

In pursuance of said agreement, on the second day of July, 1909, J. B. Bridges, acting as an attorney for defendant, the Grays Harbor Company, submitted to the complainant, a draft of formal agreement, embracing in extensive detail, a description of the lands to be conveyed by the complainant, and purchased by defendant, the Grays Harbor Company, whereupon said draft of agreement was [8] considered by the parties. H. F. Baldwin, prior to July 2, 1909, had deceased, and one J. R. Holman had become the successor of said H. F. Baldwin, and said J. R. Holman, after conference relating to the terms of said formal agreement, as Chief Engineer and Right of Way Agent of the said Grays Harbor Company, agreed with the complainant, upon the terms of said formal contract made in pursuance of the real contract hereinbefore stated, whereupon said formal contract was executed by the complainant, and is in words and figures following:

"THIS AGREEMENT, made and entered into this 7th day of July, 1909, by and between Northwestern Lumber Company, a corporation, as the party of the first part, and Grays Harbor and Puget Sound Railway Company, a corporation, as the party of the second part,

WITNESSETH:

1st. The said party of the first part, for the consideration of $134,000.00, to be paid down by second party, Twenty Thousand Dollars of which is paid down by second party, the receipt whereof is

hereby acknowledged, and the covenants and agreements hereinafter mentioned, does hereby agree to sell and convey unto the said party of the second part the following-described lands in the corrected plat of Hoquiam, Washington, to wit:

The Northeasterly half of Block 62, subject to the right of way heretofore given to the Northern Pacific Railway Company by the said party of the first part by deed dated Dec. 21, 1897, and recorded in Vol. 53 of the Record of Deeds of Chehalis County, Washington, at page 580.

All of that portion of Block 61 described as follows, [9] to wit: Commencing at a point on the Southerly line of said Block 61, which point is 159.8 feet Easterly of the Southwest corner of said Block, thence Easterly along the Southerly boundary of the said block 159.8 feet to the Southeasterly corner of said block, thence Northwesterly along the Easterly boundary of said block 310.64 feet, more or less, to the Northeasterly corner of said block, thence Westerly along the Northerly line of said block 158.7 feet, thence Southeasterly to the place of beginning.

A strip of land in Block 51 described as follows:

Commencing at the Southeasterly corner of said block, running thence Southwesterly along the Southerly boundary line of said block 100 feet, thence Northwesterly at right angles to the Northerly line of Ninth Street, 87.76 feet, thence Northeasterly and parallel with the said Northerly line of Ninth Street to the intersection of said line with the Easterly line of said block, thence Southerly to

the place of beginning.

A strip of land twenty-five feet in width in Block 50, and particularly described as follows:

Commencing at the Northeast corner of said block; thence Southeasterly along easterly boundary of said block, 250.11 feet to the alley through said block; thence Southwesterly along Northerly line of said alley a distance of twenty-five (25) feet; thence Northwesterly and parallel to the Easterly boundary of said block 250.11 feet to the Northerly boundary line of said block; thence along said boundary line of said block a distance of twenty-five (25) feet to place of beginning.

Also a right of way for railroad purposes only, twenty-five **[10]** feet in width next to the Northern Pacific Railway Company's right of way, in Lot 16, of Block 38, being all of the rights which the said first party reserved in its deed to the Hoquiam Lumber & Shingle Company of said Lot 16, said deed being dated June 3, 1908, and recorded in Vol. 98 of deeds of Chehalis County, Washington, Page 32.

Also a strip of land twenty-five feet in width in Block 70, the said strip of land being parallel and adjacent to, and on the Westerly side of the right of way of the Northern Pacific Railway Company through the said Block 70, as the same was deeded to it by the said party of the first part by deed dated December 21, 1897, and recorded in Vol. 53 of deeds of the said County at page 580.

Also the following strip of land in said Block 70, to wit:

Commencing at the Northeasterly corner of said Block 70, thence Southerly along the Easterly line of said Block 100 feet; thence Northwesterly on a curve having a radius of 598 feet to its intersection with the North line of said Block 70; thence Easterly along the Northerly line of said Block 70, 12.5 feet more or less to the place of beginning.

Also a strip of land twenty-five feet in width over and across parts of lots 12, 13, and 14, in Block 69, said twenty-five ft. strip being immediately adjacent to and parallel with and on the Northwesterly side of the Northern Pacific Railway Company's right of way as deed to the said last-named company by said deed recorded in Vol. 53 of deeds at page 580.

Also a strip of land twenty-five feet in width over and across that portion of 12th Street vacated, said strip being parallel with and adjacent to and on the Northerly side of right of way of the Northern Pacific Railway Company, according [11] to its deed of date, volume and page last aforesaid.

Also a tract of land twenty-five feet in width through that portion of Lot 1, Tract 3, Hoquiam Tide and Shore Lands between the Southerly line of the Northern Pacific right of way and the Easterly line of K Street, being 12½ feet on each side of the center line of the railroad of the said second party, as the same may hereafter be located across said Lot 1 and substantially as shown upon the map hereunto attached and made a part hereof.

Also a strip of land fifty feet in width through Lot 1, Tract 15, Hoquiam Tide and Shore Lands,

and over and across that portion of Levee Street which is Northeasterly of Block 70, being twenty-five feet on each side of the center line of the Grays Harbor and Puget Sound Railway Company as the same shall *shall* be hereafter surveyed, located and staked out and said strip of land shall be substantially as shown upon the exhibit hereunto attached and made a part hereof

Also all that portion of Lots 1 and 3, Tract 15, and of the Hoquiam Tide and Shore Lands which may be affected by the swing of any bridge which the said second party may construct and operate across the Hoquiam River at what is known as the Simpson Avenue crossing, the rights to be given for such bridge swing to be easements only.

Also the right and privilege of constructing, maintaining and operating perpetually a line of railroad upon that portion of Levee, so called, lying between Sixth Street on the North, and Eleventh Street on the South, and between the Northeasterly boundary lines of Blocks 38, 50, 51, 61, and 62, and the Northern Pacific R. R. right of way on said Levee Street, including the crossings of 7th Street, 9th Street, 10th Street and 11th Street. **[12]**

All of said instruments so to be executed by the Northwestern Lumber Company shall be by deeds of warranty, except the twenty-five ft. right of way reserved in said Lot 16, Block 38, and except the easements for the swing of the said bridge across Lot 1, Tract 15, and except said 7th, 9th, 10th & 11th Street crossings, as heretofore mentioned, and except said rights in Levee Street, and said convey-

ances or rights so excepted as above, shall be transferred by assignments, deeds of easement, or quit-claim deeds as the case may be.

3d. Whenever either of the parties hereto demand same, each shall dedicate to the public a twenty-five foot strip of land for street purposes through the center of said Blocks 61 and 62, and of the said first and second parties hereto so dedicating a twenty-five foot strip.

4th. In the event the said second party should petition the Council of the City of Hoquiam for a vacation of those portions of 9th Street and 10th Street and 11th Street which lie Northeasterly of the street to be dedicated as above mentioned, the said first party agrees to assist in procuring such vacations and agrees to and does waive any and all damage to any of its property on account of such vacation. But, however, said second party agrees that as soon as said portion of Ninth Street shall be vacated, it will, by a proper instrument in writing, give to the first party and to the Public at large a perpetual crossing or easement over said strip so vacated for all kinds of travel by foot or team or otherwise (except the right to lay any kinds of tracks thereon), and thereafter said second party, its successors and assigns, shall maintain at its, or their, own expense such easement in suitable condition for such travel **[13]** and will keep said crossing or easement open, and will not suffer or permit the same to be blocked by any of its acts; but second party will, in such instrument, reserve forever the right to put, maintain and operate railroad

tracks over and across the same, in any number or manner it may see fit, but always upon grade with the streets immediately surrounding such part of street so vacated.

The easement so to be given shall not, however, place said crossing or roadway under the control of the City of Hoquiam, nor shall it make the same, nor shall it become a common street of said city; but, however, the police officers of said city may keep said roadway open for said travel, and keep the same from being blocked.

5th. The deeds hereby called for and the payments herein provided to be made shall be made on or before the first day of August, 1909, provided the title to the lands herein described be found by the second party to be sufficient and be passed by its attorneys.

6th. The said first party shall be entitled to the possession of the lands herein agreed to be conveyed for the period of six months immediately following the date of the execution and delivery of the deeds and instruments herein provided for; such possession to be free of rent, and the said first party is given the right to remove any and all buildings or improvements on any of the said lands provided such removal be done on or before six months of the date of said deed and other instruments, provided said party of the second part may enter upon any of the premises herein proposed to be conveyed, for the purpose of beginning and carrying on the construction of its railroad and bridges, [14] in so far as it can be done without injury to the said party of the first

part, and in the enjoyment of right granted them in the first part of this paragraph.

7th. It is agreed by the said first party and their officers, that they will co-operate with the said second party in procuring such franchises of the City of Hoquiam as it may desire, and in securing such additional rights of way in the City of Hoquiam as the second party may desire.

8th. It is stipulated by the first party that the construction of the approach to the proposed bridge on the extension of Simpson Ave. shall be so arranged as to interfere with the handling of logs in their mill pond the least possible, and with that object in view that an ample span shall be placed West of the West pier of the drawbridge, and that the bridge abutment be placed as nearly as possible, consistent with the economical spacing of the spans of said bridge, and in accordance with the requirements of the U. S. Government, about thirty ft. into the river from the line of the piles of the first party's pond as such piles are now driven. It is also further stipulated by the first party that such bridge may be a joint user bridge with the City of Hoquiam provided the City of Hoquiam contributes its share of cost of construction and maintenance.

IN WITNESS WHEREOF, all of the said parties have caused this instrument to be executed by their proper officers and their seals to be affixed hereto

on the day and date in this instrument first above written.

NORTHWESTERN LUMBER COMPANY,
By C. H. JONES,
President.
By A. R. JONES,
Ass't Secretary.

GRAYS HARBOR AND PUGET SOUND RAILWAY COMPANY. [15]
By ——————————,
President.
By ——————————,
Secretary.

State of Washington,
County of Chehalis,—ss.

At the same time and place personally appeared before me C. H. Jones and A. R. Jones, who are to me well known to be respectively the President and Assistant Secretary of the *Northwest* Lumber Company, and they acknowledged the foregoing instrument to be a free and voluntary act and deed of the said corporation for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute such instrument, and that the seal affixed is the corporate seal of said company.

In witness whereof, I have hereunto set my hand and affixed my official seal on the day and date in this certificate first above written.

WALTER C. GREGG,
Notary Public for the State of Washington, Residing at Hoquiam.

State of Washington,
County of Chehalis,—ss.

Be it remembered that on this —— day of ————, 1909, personally appeared before me, A. J. West, who is to me known to be the President of the Grays Harbor and Puget Sound Railway Company, and acknowledged the foregoing instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute the said instrument. **[16]**

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal on the day and date in this certificate first above written.

————————————,
Notary Public for the State of Washington, Residing at Aberdeen.

State of Washington,
County of King,—ss.

Be it remembered that on this —— day of ————, 1909, personally appeared before me G. C. Teal, who is to me known to be the Secretary of the Grays Harbor and Puget Sound Railway Company, which executed the foregoing instrument and acknowledged the said instrument to be the free and voluntary act and deed of the said corporation, and on oath stated that he was authorized to execute such instrument, and that the seal affixed thereto is the seal of the said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal on the day and date in

this certificate first above written.

_____,

Notary Public for the State of Washington, Residing at Seattle."

VII.

On the 7th day of July, 1909, the complainant at the request of said J. R. Holman, forwarded said formal agreement duly executed, to the chief office of the company [17] at Seattle, Washington, accompanying said transmission with the letter following:

"July 7, 1909.

Grays Harbor & Puget Sound Railway Company,
Burke Bldg., Seattle, Wash.

Gentlemen:—

We enclose herewith duplicate copies of the Agreement this day reached at Hoquiam, Wash. by your Company represented by your engineer, Mr. J. R. Holman, and our Company, represented by our President, Mr. C. H. Jones. These copies have been duly executed by the Northwestern Lumber Company and one of them please have executed by your Company and return to us, together with remittance stipulated, twenty thousand dollars ($20,000).

Yours truly,
NORTHWESTERN LUMBER CO.,
GEORGE H. EMERSON,
Vice-Pres."

VIII.

On or about September 15th, 1909, the defendant, the Grays Harbor Company, having through its attorney, J. B. Bridges, examined the abstracts of

title to the property to be conveyed by this complainant, and this complainant not having received a duplicate of the said agreement duly executed by the said company requested the said Bridges to deliver to the complainant the said formal agreement, which request the said Bridges, for and in behalf of the said corporation, answered in words and figures following: [18]

"Sept. 15, 1909.

Northwestern Lumber Co.,
Hoquiam, Wash.

Gentlemen:

Per your request of this date I herewith hand you a proposed agreement between yourself as the party of the first part, and Grays Harbor and Puget Sound Railway Company as the party of the second part, the same being with reference to the purchase of certain properties from you. Such agreement being dated July 7, 1909, and having been executed by you, but not by the Railway Company.

I consider that since this agreement has not been executed by the Railway Company yet you are entitled to have it returned to you, but by so returning to you it is not the intention of the Railway Company to waive any rights which it has with reference to the agreement to purchase this property and I anticipate that it is not your intention that the handing of these papers to you should have that effect.

Yours truly,
J. B. BRIDGES,
For G. H. & P. S. Ry. Co."

IX.

Between June 9, 1909, and September 15, 1909, the general officers of the complainant and the general officers of the defendant, the Grays Harbor Company, held frequent conferences. The complainant immediately after the making of said agreement on June 9, 1909, began to make preparations for the vacation of said property, which preparations [19] included the construction of a new residence for the Vice-president and Manager of the complainant, George H. Emerson, the site of his former residence being included in the property sold. Complainant also entered construction of a new building for the carrying on of the merchandise branch of its business; tenants were notified of the termination of their leases and were required to vacate the property, and in other respects the complainant in good faith was carrying out the terms of said agreement, at an expense to it of many thousand dollars. At the said conferences the officers of the said Grays Harbor Company were notified of these expenditures and these preparations. Notwithstanding such notice and knowledge of the said Grays Harbor Company of said expenditures in the performances of said agreement, the said Grays Harbor Company indicated no intention or desire to cancel the said contract.

X.

In pursuance of said contract the complainant has not only expended many thousand dollars, to wit: Upwards of Fifty Thousand Dollars ($50,000.00), but has in various and sundry ways changed the lo-

cation and nature of its business.

XI.

This complainant has at all times since the ninth day of June, 1909, been, and is now, ready and willing to enter into a formal agreement in strict accordance with the terms of the contract consummated on that date, and on its part has strictly complied with said agreement. The formal contract signed by the officers of the complainant, copy of which is hereinbefore set forth, in form and substance conforming to the request of agents and officers of the [20] defendant, the Grays Harbor Company, having charge of the business for the said company, is herewith tendered. If, in strict language, the said form departs from the substance and intentions of the parties, the complainant is now, and always has been, ready to reform said formal agreement to conform to and express their intention.

XII.

One June 27th, 1910, defendant, Grays Harbor Company, entered into a contract in the form of a deed duly acknowledged with defendant Oregon Company, wherein and whereby the Grays Harbor Company sold and conveyed to the Oregon Company all its property of every kind and character, including contracts, rights of way, franchises, powers and privileges, together with right to enforce the same, and as a part of the consideration of said conveyance the Oregon Company undertook and agreed to assume all the obligations of the Grays Harbor Company, by virtue of which contract and deed the Oregon Company became the owner of the rights of the

Grays Harbor Company, in respect to the property and contract hereinbefore described, and became obligated to discharge the same. On the 23d day of December, 1910, the Oregon Company entered into a contract in the form of a deed duly acknowledged, with the defendant, the Navigation Company, wherein and whereby the Oregon Company assigned and transferred to the Navigation Company all the property, together with other property, acquired by the Oregon Company from the Grays Harbor Company, including the property and contract with the complainant hereinbefore described, and as a part of the consideration for said conveyance the Navigation Company agreed to assume [21] and discharge all the obligations of the Oregon Company pertaining to said contracts.

XIII.

In said deeds from the Grays Harbor Company to the Oregon Company, and from the Oregon Company to the Navigation Company, reference is made to a contract between the Grays Harbor Company and the defendant, the Milwaukee Company, wherein it appears that the said Milwaukee Company has acquired some interest in the property of the Grays Harbor Company, and that the defendants, Oregon Company and Navigation Company, have taken over said property charged with said interest. The complainant is not informed and has no means of informing itself of the nature of said agreement with the Milwaukee Company, but upon information it states that the Milwaukee Company has some interest in said property and has assumed some obligations and lia-

bilities respecting the same, but as to the extent of said interest and the nature of said obligations, the complainant has not sufficient information to make definite allegation. Complainant has therefore made the Milwaukee Company a party to this proceeding, and asks that it may be required to answer, but not under oath, and set forth the nature and extent of its interest in the controversy, and become subject to whatever judgment and decree may be rendered.

XIV.

The complainant has heretofore, to wit, in June, 1911, tendered deeds conveying to the Grays Harbor Company clear title to all the property covered in the contract between that company and complainant hereinbefore stated. [22] This complainant herewith tenders deeds conveying clear and unencumbered title to all the property embraced in said contract, to the defendants or any of them as their interests shall appear.

IN CONSIDERATION WHEREOF and forasmuch as your orator is remediless in the premises according to the strict rules of the common law, and can only have relief in a court of equity where matters of this kind are properly cognizable, your orator therefore prays the aid of this Honorable Court:

1. That the said defendants may be required to make answer respectively unto all and singular the matters hereinbefore stated and charged, as fully and particularly as if the same were herein expressed and they thereunto particularly interrogated, but not under oath, an answer under oath being expressly waived.

2. That the defendant, the Grays Harbor and Puget Sound Railway Company, may be required to execute the formal agreement thereinbefore tendered by the complainant, or in lieu thereof, such other formal agreement as the Court may find in strict conformity with the contract entered into between the parties, and that the defendant, or as the case may be, the defendants, according to their personal interest, may be required to accept deeds conveying the property, particularly described in the formal agreement hereinbefore tendered, and described on the map furnished to the complainant at the time of entering into said contract, to wit: On or about June 9, 1909, which map and which descriptions, by agreement of [23] the parties at the time of making said contract, accurately described the property embraced in the complainant's proposition under date of September 25th, and the Grays Harbor Company's acceptance thereof under date of June 9th.

3. That an account may be taken showing the amount of interest due to the complainant, and that the complainant may be awarded judgment against the defendants and each of them, for the principal sum of One Hundred Thirty-four Thousand Dollars ($134,000.00), together with interest thereon since the 7th day of July, 1909.

And such other and further relief as your orator may be entitled to in equity and under the practices of your Honorable Court.

May it please your Honors to grant to your orator writs of subpoena to be directed to each of the said

defendants hereinbefore named, therein and thereby commanding them, and each of them, at a time certain and under certain penalty to be named, to be and appear before your Honors in this Honorable Court, then and there to answer all and singularly the matters aforesaid, but not under oath, answers under oath being hereby expressly waived, and stand and abide and perform such other and further orders or decrees as to your Honors shall seem just and meet.

[Seal]

NORTHWESTERN LUMBER COMPANY,
By C. F. JONES,
President.

BENJAMIN GROSSCUP and
WM. MORROW,
Solicitors for Complainant and of Counsel. [24]

United States of America,
Western District of Washington,
County of Pierce,—ss.

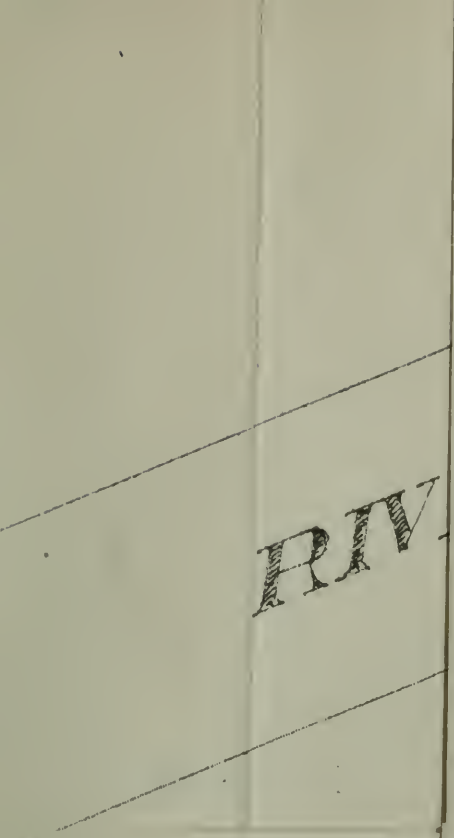
C. H. Jones, being first duly sworn, deposes and says that he is the President of the Northwestern Lumber Company, the above-named complainant; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters he believes the same to be true; that the seal affixed to said bill of complaint is the corporate seal of said complainant, and was affixed by its authority.

C. H. JONES.

Sworn to before me this 27th day of September, 1911.

[Notarial Seal] W. J. ELLIOTT, [Seal]
Notary Public in and for the State of Washington,
Residing at

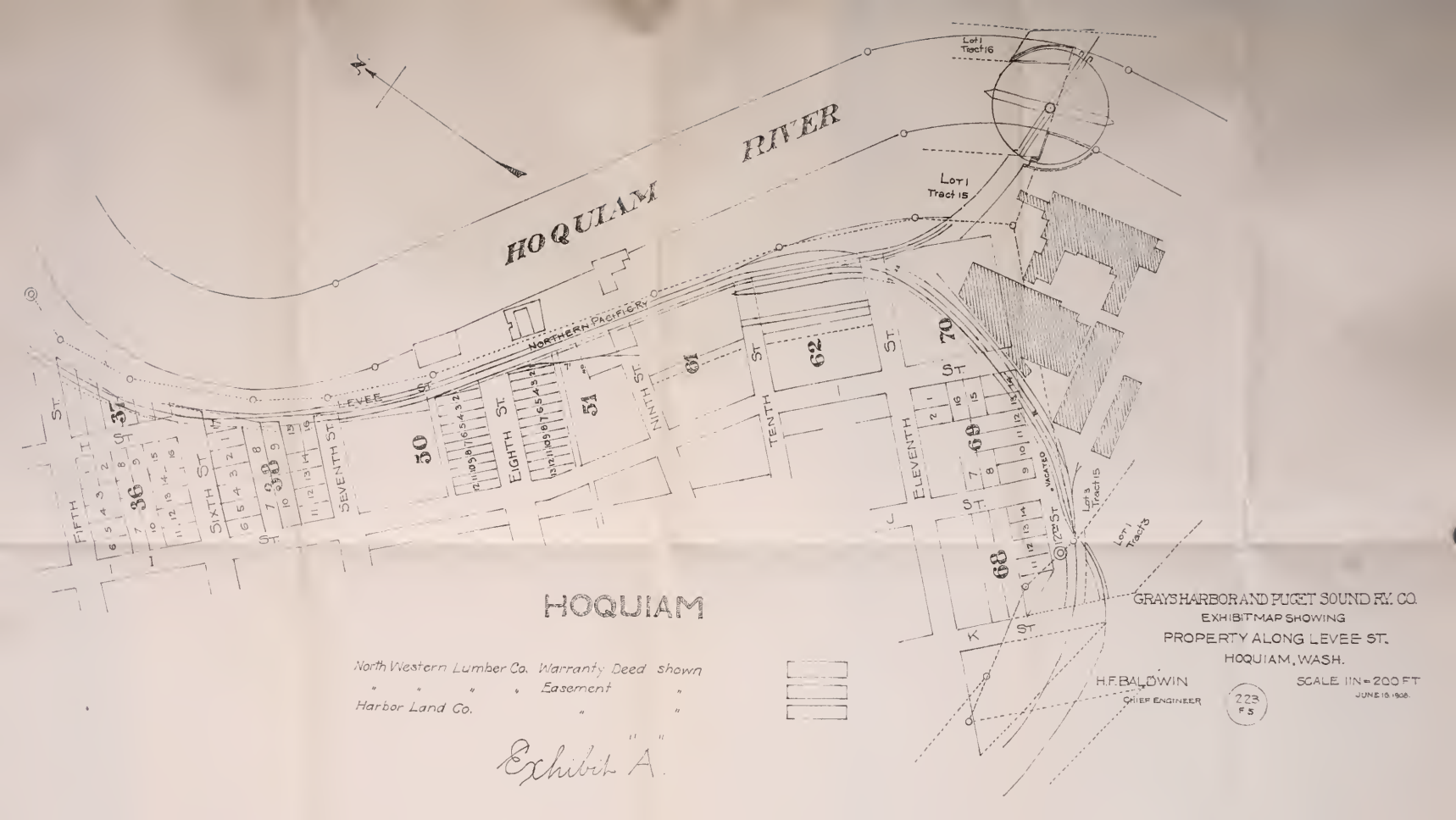
[Filed Sept. 29, 1911.] [25]


RIV

Sworn to before me this 27th day of September, 1911.

[Notarial Seal] W. J. ELLIOTT, [Seal]
Notary Public in and for the State of Washington,
Residing at

[Filed Sept. 29, 1911.] [25]



HOQUIAM

North Western Lumber Co. Warranty Deed shown
" " " " Easement "
Harbor Land Co. " "

Exhibit "A"

GRAYS HARBOR AND PUGET SOUND RY. CO.
EXHIBIT MAP SHOWING
PROPERTY ALONG LEVEE ST.
HOQUIAM, WASH.

H.F. BALDWIN
CHIEF ENGINEER

SCALE 1 IN = 200 FT
JUNE 13, 1908.

223
F 5

Demurrer.

The demurrer of Grays Harbor & Puget Sound Railway Company, Oregon and Washington Railroad Company, and Oregon-Washington Railroad & Navigation Company, defendants, to the Bill of Complaint of Northwestern Lumber Company, the above-named complainant.

These defendants, not confessing or acknowledging all or any of the matters or things in the said Bill of Complaint contained to be true, in such manner and form as they are herein set forth, demur to the said bill and for causes of demurrer, show:

I.

That it appears by the facts stated in complainant's own bill that it is not entitled to the relief prayed against these defendants.

II.

That there is no equity upon the face of said bill.

III.

That it appears by the said bill that neither the contract which is alleged by the said bill, and of which the complainant by the said bill seeks to have the benefit, nor any memorandum or note thereof, was ever signed by these defendants or either or any of them, or by any person authorized thereunto, within the meaning of the statute of the State of Washington for the prevention of frauds and perjuries.

IV.

That it appears by complainant's own bill that these defendants never reached a final agreement

with the complainant respecting the matters referred to in said bill, but that the matters therein referred to were matters of negotiation only, and [26] about which no final agreement was ever made by these defendants with the complainant.

V.

That it appears by said bill that the complainant did not promptly elect to enforce specific performance of the alleged agreement against these defendants, or either of them, and that he has been guilty of such laches as should bar him from the relief prayed for in said bill.

VI.

That the complainant has a full, adequate and complete remedy at law.

WHEREFORE, these defendants respectively demand judgment of this Honorable Court whether they shall be compelled to make any further or other answer to the said bill or to any of the matters and things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

BOGLE, GRAVES, MERRITT & BOGLE,
Solicitors for Defendants.

(Verification.)

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

W. H. BOGLE,
One of the Solicitors for Defendants.

(Filed Oct. 28, 1911.) [27]

Memo. Opinion [on Demurrer to Bill].

BENJAMIN S. GROSSCUP and WILLIAM C. MORROW, for Complainant.

BOGLE, MERRITT & BOGLE, for Defendants.

RUDKIN, District Judge. This is a bill in equity by a vendor for the specific performance of a contract for the sale of certain real property for right of way and other railroad purposes. It appears from the allegations of the bill that during the year 1908 the Grays Harbor and Puget Sound Railway Company was engaged in the construction of a railroad from the city of Centralia, in Lewis County, to the city of Hoquiam, in Chehalis County, in this State; that by and through its Chief Engineer, one H. F. Baldwin, it entered into negotiations with the complainant for the purchase of certain lands for right of way and other railroad purposes in the city of Hoquiam, and that pursuant to such preliminary negotiations, on the 25th day of September, 1908, the complainant made to the defendant, through its Chief Engineer, a written offer, embodying three separate and distinct propositions, the second and third of which are as follows:

" 'Simpson Avenue Line,' with depot *grands* in Block 50. Across Northwestern Lumber Company's log pocket on the extension of Simpson Avenue, which is across Lot 1 of Tract 15, Plat 9, Hoquiam Tide & Shore Lands; thence across or along Levee Street, adjacent to Block 70, 62, 61, eighty-eight feet

in Block 51 and two hundred and fifty feet, eleven inches, in Block 50, together with the return right of way through Blocks 62, 70 & 69, joining Northern Pacific right of way through those Blocks and through Lot 3, Tract 15, Plat 9, to Railroad Avenue, along Twelfth Street vacated and adjoining Northern Pacific [28] Track, to K Street. This right of way to be adequate for double trackage except on its return or switch track through Blocks 70, 69 and Twelfth Street. Also to include for depot grounds the East 182 feet of Block 50, all for the sum of $102,000.00 One Hundred Two Thousand Dollars."

" 'Emerson's proposition.' The same as Simpson Avenue Line omitting depot grounds in Block 50 and adding the East half of Blocks 62 & 61 and eighty-eight feet on Levee Street by 100 feet in Block 51, you to join with the Northwestern Lumber Company dedicating 50-foot street along the center line of Blocks 61 & 62, for the sum of One Hundred Thirty-four Thousand Dollars ($134,000.00)."

This offer was accepted by letter of June 9, 1909, which reads as follows:

"We beg to advise you that we accept what is called the 'Emerson' proposition, contained in your letter to Mr. H. F. Baldwin dated September 25th, 1908, being your proposition for One Hundred and *Thirty-four* ($134,000) *Dollars.*"

"We will present you a map showing in detail such proposition and a formal agreement shall be entered into, pending actual transfers."

"However, we will expect and you shall give us your co-operation in procuring other properties in

Hoquiam and also franchises in Hoquiam."

"You shall without delay furnish our attorneys with abstracts of title and our attorneys shall have twenty (20) days after delivery of abstracts within which to examine same, and upon our attorneys passing title, and delivery by you to us of proper deeds of warranty to such property, we will pay you the aforesaid sum. All buildings to be removed by you within six [29] months of the date of deed."

This acceptance or proposition was in turn accepted by the complainant. Immediately thereafter Baldwin, acting for the defendant Railway Company, prepared and submitted a map showing in detail the land, right of way, and all property covered by the agreement, a copy of which is attached to the bill of complaint.

Under date of July 7, 1909, a formal written agreement was prepared by the attorney for the Railway Company, embodying the terms of the contract thus agreed upon. This agreement was executed by the complainant on the date of its preparation, but was never executed by the defendant. On the 15th day of September following the complainant requested a return of the written contract in question for some purpose not disclosed by the bill, aside from the fact that it had not received a duplicate executed by the Railway Company, as requested, and the agreement was thereupon returned, accompanied by the following letter:

"Per your request of this date I herewith hand you a proposed agreement between yourself as the party of the first part, and Grays Harbor and Puget Sound

Railway Company as the party of the second part, the same being with reference to the purchase of certain properties from you. Such agreement being dated July 7, 1909, and having been executed by you, but not by the Railway Company."

"I consider that since this agreement has not been executed by the Railway Company, yet you are entitled to have it returned to you, but by so returning to you it is not the intention of the Railway Company to waive any rights which it has with reference to the agreement to purchase this property, and I anticipate that it is not your intention that the handing of these papers [30] to you should have that effect."

The bill further avers that between June 9, 1909. and September 15, 1909, the general officers of the complainant and the general officers of the Railway Company, held frequent conferences; that the complainant immediately after the making of the agreement of June 9, 1909, began making preparations for the vacation of the property and for the construction of new buildings; terminated leases, etc.; that at such conferences the officers of the Railway Company were notified of such expenditures and such preparations; that notwithstanding such notice and knowledge the railway company indicated no intention or desire to cancel the contract, and that the expenditures so made exceeded the sum of $50,000.

The bill further avers a readiness and ability on the part of the complainant to perform its part of the contract; the tender of a deed in June, 1911, and sets forth certain contracts and agreements between

the defendants which are not material to our present inquiry.

The defendants have interposed a demurrer to the bill for want of sufficient facts and the following suggestions have been presented to the Court in support of the argument on the demurrer:

The defendants contend, first, that there was no contract between the parties; second, that a part of the consideration for the contract was personal services to be rendered by the complainant for the Railway Company, and that in such cases specific performance will not be decreed; third, that the complainant was not the owner of all the property at the time the contract in suit was entered into; and, fourth, that the complainant has been guilty of laches. [31]

1. While the acceptance by the Railway Company contemplated the *executed* of a formal written contract, pending the actual transfer of the property, yet the offer and the acceptance would seem to contain all the essential elements of a valid, definite, binding contract. They contain the names of the parties, the consideration, a description of the property, the time of payment, and even the nature of the instrument of conveyance, leaving nothing, it would seem, to be settled or agreed upon by future negotiations. The rule in such cases is, that where it appears that the minds of the parties have met, that a proposition for a contract has been made by one party and accepted by the other, that the terms of the contracts are in all respects definitely understood and agreed upon, and that a part of the mutual

understanding is, that a written contract embodying these terms shall be drawn and executed by the respective parties, this is an obligatory agreement.

9 Cyc. 282.

The negotiations set forth in the bill of complaint would seem to satisfy the requirements of this rule. Doubtless the fact that the parties contemplated the execution of a future formal contract is some evidence that they did not intend that their previous negotiations should be final, and perhaps other extrinsic facts might be shown having a similar tendency, but I am nevertheless of the opinion that an enforceable contract is disclosed by the bill, and such seems to have been the view taken by the Railway Company itself when it returned the proposed written contract unexecuted.

2. No doubt where a substantial part of the consideration for a contract is personal services to be rendered by one party for the other, and such services have not been performed, a **[32]** court of equity will not, as a general rule, decree specific performance, for the Court will not create the relation of master and servant against the will of the parties, nor will it undertake *the* superintend the performance of a contract for services of that kind. This case, however, in my opinion, does not fall within the rule of law upon which the defendants rely. No definite services were agreed upon, nor was it at all certain that the co-operation of the complainant would ever be required. This provision of the contract was manifestly collateral to the main agreement, and was not a condition precedent to the

transfer of the property or the payment of the purchase price. The negotiations of the parties contemplated a transfer and payment in the near future, while the services provided for might not be called for until a much later date, if at all. Furthermore, this part of the agreement is so general and indefinite as to the kind or character of the services to be performed, that it is doubtful if any action would lie for its breach unless the complainant, by some overt act, attempted to interfere in the acquisition of property or the obtaining of franchises.

3. The fact that the complainant was not the owner of all the property to be conveyed, at the time of the execution of the contract, is no objection to specific performance, especially where that fact was known to and within the contemplation of the parties to the contract at the time of its execution. If the complainant is possessed of a clear title and able to convey at the date of the decree, equity as a rule requires no more.

36 Cyc. 627.

Hepburn vs. Dunlop, 1 Wheat. 179.

Day vs. Mountin, 137 Fed. 756. **[33]**

Such was the situation disclosed by the bill in this case.

4. There is nothing on the face of the bill to show laches on the part of the complainant, except the mere lapse of time from September, 1909, to June, 1911. This fact alone is not sufficient to constitute laches. As said by the Court in Townsend vs. Vanderwelker, 160 U. S. 171, 186:

"The question of laches does not depend, as does

the statute of limitations, upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether, under all the circumstances of the particular case, plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did."

Within this rule I do not think that the mere lapse of two years is a bar to equitable relief, independent of the surrounding circumstances, which are not disclosed by the bill. This is especially true in view of the fact that the preliminary negotiations covered a period of a year, and almost nine months elapsed between the date of the offer and its acceptance. Extrinsic facts suggested on the argument would no doubt have a controlling effect on the question of laches. If, as suggested, the complainant demanded a return of the unexecuted contract in September, 1909, and took no steps to enforce the contract for a period of almost two years thereafter, and if in the meantime the Railway Company changed its position and acquired another right of way, a court of equity would hesitate long before decreeing specific performance. Again, if the Railway Company has acquired another right of way and constructed its road over the new line into the city, and will never require or use the right of way in controversy, the same rule ought to follow. The consideration of $134,000 included the value of property taken, damages to [34] property not taken by reason of the taking of a part, and injury to property arising from the operation of trains. If the road is not built or operated, the complainant will never suffer the two

last elements of damage, and is here asking a court of equity to award him damages which he will never suffer. The Court is further asked to sever the title to this property by decree, in a manner which will necessarily be extremely prejudicial to both parties with no corresponding benefit to either. I doubt if a Court can be prevailed upon to grant such relief.

These last matters to which I have referred are outside of the record, but I deem the comment called for by the wide range taken on the oral argument. For aught that appears on the face of the bill, however, the demurrer should be overruled, and it is so ordered.

(Filed Feb. 2, 1912.) **[35]**

Separate Answer of Grays Harbor & Puget Sound Railway Company, Oregon and Washington Railroad Company and Oregon–Washington Railroad & Navigation Company to Bill of Complaint.

To the Judges of the District Court of the United States for the Western District of Washington:

The joint and several answers of the Grays Harbor and Puget Sound Railway Company, Oregon and Washington Railroad Company and Oregon-Washington Railroad & Navigation Company to the Bill of Complaint herein:

These defendants respectively, now and at all times herein saving to themselves all and all manner of benefit of exception or otherwise, that can or may be had or taken to the many errors, uncertainties

and imperfections in the said bill contained, for answer thereto, or to so much thereof as these defendants are advised it is material or necessary for them to make answer to, severally answering say:

I.

They admit the allegations of paragraph I of said bill.

II.

They admit the allegations of paragraph II of said bill.

III.

They admit the allegations of paragraph III of said bill, except that they deny that said Baldwin was authorized to contract for any such property as alleged in said paragraph.

IV.

They admit the execution of the writing, as set forth in paragraph IV of said bill; but they deny that the same was intended by the parties thereto to be or constituted an acceptance of any proposition theretofore made by said *complain* [36] to said Grays Harbor Company; they admit that said Baldwin, after the execution of said writing, gave complainant a map, a copy of which is attached to said Bill of Complaint, marked Exhibit "A." They deny each and every allegation, matter, statement, and thing contained in paragraph IV of said bill, save and except as in this paragraph expressly admitted.

V.

Answering the allegations of paragraph V of said bill, they admit that complainant delivered Abstracts

of Title covering lands intended to be covered by said writing of June 9, 1909, to said J. B. Bridges, but they deny that said abstracts disclosed the power of complainant, Northwestern Lumber Company, to convey a clear and unencumbered title to all of said lands. They deny that it was understood by said Grays Harbor Company that title to any of said property stood of record in the name of any person or party other than complainant; and they deny that said Grays Harbor Company understood that complainant had power to contract for the sale of any such property standing in record in the name of any other person or corporation than said complainant, and deny that complainant had any such power or authority, or was able to deliver clear title thereto. They deny any knowledge or information thereof sufficient to form a belief as to the allegations in said paragraph V of said bill, that any conveyance or conveyances from any party or parties other than complainant, to any such premises, have been made, or that said complainant has been able or willing to make full, clear and unencumbered title to all of said premises.

VI.

Answering the allegations of paragraph VI of said bill, they admit that said J. B. Bridges, acting as attorney for said Grays Harbor Company, submitted to complainant a draft of a formal agreement to be entered into between said company and complainant, [37] relative to the purchase and sale of the premises intended to be covered by said writing of June 9, 1909, and that such draft of agreement

was considered by said parties. They admit that said H. F. Baldwin died prior to July 2, 1909, and that said J. R. Holman became Chief Engineer of said Grays Harbor Company after the death of said Baldwin. They deny that said Holman, as such Chief Engineer and Right of Way Agent of said Grays Harbor Company, or otherwise, or said company, ever agreed with complainant upon the terms of a formal contract, as alleged in paragraph VI of said bill, or otherwise. They admit that said complainant signed and executed the so-called agreement set forth in said paragraph VI, which had been prepared by complainant; but deny that the same was ever agreed to or accepted by said Holman or said Grays Harbor Company.

VII.

They admit that complainant forwarded said so-called agreement so signed and executed by it to said Grays Harbor Company, at Seattle, Washington, accompanied by a letter, reading as set forth in paragraph VII of said bill; but they deny that it did so at the request of said Holman, or that the statements contained in said letter were known to said Holman, prior to the said letter being so sent by complainant, or that the same were acquiesced in by said Holman, and they deny the statements therein contained that the said so-called agreement was an agreement reached between said Grays Harbor Company and said complainant.

VIII.

They admit the allegations of paragraph VIII of said bill.

IX.

They admit that between June 9, 1909, and September 15, [38] 1909, the general officers of the complainant and officers of the Grays Harbor Company held frequent conferences, but they deny that said officers of said Grays Harbor Company did not at said conferences indicate a desire or intention to cancel said contract, if by such allegation as contained in paragraph IX of said bill is meant said so-called agreement so signed by complainant. Except as in this paragraph expressly admitted, they deny any knowledge or information thereof, sufficient to form a belief, as to any allegation, matter, statement or thing contained in paragraph IX of said bill.

X.

They deny that said complainant made any expenditures in changing its location, or the nature of its business, pursuant to any contract entered into between complainant and said Grays Harbor Company as alleged in paragraph X of said bill, and they deny any knowledge or information thereof sufficient to form a belief, as to whether or not said complainant did make any expenditures in changing the location or nature of its said business, as alleged in said paragraph.

XI.

To so much of said bill of complaint as alleges in paragraph XI thereof that said complainant has at all times since June 9, 1909, been ready and willing to enter into a formal agreement, in strict accordance with the terms of the contract consummated on

June 9, 1909, and to strictly comply with said agreement, these defendants say that the same is not true; that said complainant has never, to the knowledge of these defendants, been ready or willing to enter into a formal agreement, in accordance with any understanding or agreement between said complainant and said Grays Harbor Company; but as to whether or not said complainant is now ready and willing to enter into a formal agreement, in accordance with the intent of said writing of June 9, 1909, these defendants have [39] no knowledge or information sufficient to form a belief. They deny that the copy of the so-called agreement set forth in said bill and referred to in said paragraph XI is in form or substance according to the request of the agents or officers of said Grays Harbor Company.

XII.

Answering the allegations of paragraph XII of said bill, they admit that on or about June 27, 1910, the defendant Grays Harbor Company entered into a contract in the form of a deed, duly acknowledged, with the defendant Oregon Company, wherein and whereby the Grays Harbor Company sold and conveyed to said Oregon Company all its property of every kind and character, including contracts, rights of way, franchises, powers and privileges, together with the right to enforce the same, but they deny that in and by said contract and deed said Oregon Company undertook or agreed to assume all of the obligations of said Grays Harbor Company, and they deny that by said contract and deed said Oregon Company became the owner of any rights in respect

to the property of said complainant, or any contract between said complainant and said Grays Harbor Company, or became obligated to discharge any such contract. They admit that on or about December 23, 1910, the said Oregon Company entered into a contract in the form of a deed, duly acknowledged, with the defendant Navigation Company, wherein and whereby the said Oregon Company assigned and transferred to said Navigation Company certain property, together with other property, acquired by the Oregon Company from the Grays Harbor Company, but they deny that any property of said complainant or any contract theretofore entered into between complainant and said Grays Harbor Company were included in said deed from said Oregon Company to said Navigation Company, and they deny that said Navigation Company, in and by said deed, agreed to assume and discharge [40] any obligation of said Oregon Company or of said Grays Harbor Company pertaining to any contract entered into between complainant and said Grays Harbor Company or said Oregon Company.

XIII.

They admit that in the said deeds referred to in paragraph XIII of said bill, reference is made to a contract between said Grays Harbor Company and the defendant, the Milwaukee Company, wherein said Milwaukee Company acquired an interest in the property of the Grays Harbor Company, and that the defendants, Oregon Company and Navigation Company, took over said property charged with said interest, but they deny that said Milwaukee Company, in and by said contract or otherwise, has acquired

any interest in any property of said complainant, or assumed any obligation or liability respecting the same.

XIV.

They deny that complainant in June, 1911, or at any other time, tendered deeds conveying to the Grays Harbor Company clear title to all of the property intended to be covered by said writing of June 9, 1909, or by any contract theretofore entered into between said complainant and said Grays Harbor Company.

Further answering said bill of complaint, and as an affirmative defense thereto, these defendants severally allege and show to your Honors that the facts with reference to the matters and things mentioned and referred to in said bill of complaint are as follows, and not otherwise:

I.

That the said Grays Harbor Company is a corporation duly organized, created and existing under and by virtue of the laws of the State of Washington, duly incorporated therein prior to the year 1908, for the purpose of constructing and operating [41] a line of railway in said State of Washington, between the city of Centralia, in Lewis County, and the city of Hoquiam in Chehalis County. That the said Oregon Company is a corporation duly organized, created and existing under and by virtue of the laws of the State of Oregon, prior to the year 1909, for the purpose of constructing and operating a line of railway from the city of Portland, Oregon, to the city of Everett, Washington, and branch lines. That

the said Navigation Company is a corporation duly organized, created and existing under and by virtue of the laws of said State of Oregon, during the month of December, 1910, for the purpose of purchasing, constructing and operating railway lines in said States of Oregon and Washington. That said Milwaukee Company is a corporation duly organized, created and existing under and by virtue of the laws of the State of Washington prior to the year 1909, for the purpose of owning, constructing and operating lines of railway in said State of Washington and elsewhere.

II.

That during the year 1908 said Grays Harbor Company, desiring to acquire lands for railway right of way purposes and for station grounds and railway yards, in said city of Hoquiam, Chehalis County, Washington, entered into negotiations with the said complainant, for the purpose of purchasing from said complainant such lands for such purposes, and for no other purposes whatever. That thereafter, and on or about September 25, 1908, during the course of such negotiations, the said complainant submitted to said Grays Harbor Company alternative propositions in writing, for the sale to said Grays Harbor Company of such lands for such purposes, which propositions are contained in the writing set forth in paragraph III of the bill of complaint herein. That said Grays Harbor Company did not [42] accept either of the propositions contained in said last mentioned writing, but such negotiations with reference to the purchase and sale of lands for

the purposes aforesaid were thereafter continued between the officers of said complainant and the officers of said Grays Harbor Company; and in the course of such negotiations, on or about the 9th day of June, 1909, H. F. Baldwin, who was then Chief Engineer of said Grays Harbor Company, made to said complainant a counter-proposition in writing for the purchase of lands for the purposes aforesaid, which counter-proposition is contained in the writing set forth in paragraph IV of said bill. That the said writing did not purport to contain, and it was not intended by the said Baldwin to contain, nor understood by the said complainant that it did in fact contain, all of the terms and conditions upon which the said Grays Harbor Company should purchase such lands, or upon which the said complainant should sell the same; but that it was intended and understood by both said parties at said time that the terms and conditions of such sale, and the agreements of the respective parties thereto in connection with the said purchase and sale of lands intended to be covered by said writing, should be thereafter agreed upon between the said complainant and the said Grays Harbor Company, and such agreement when reached, reduced to writing and signed by the said parties; and it was then well understood between the said parties that neither said proposition, nor the acceptance thereof by the said complainant, should be or constitute a binding agreement between the said parties, until the terms and conditions of such purchase and sale, and all matters connected therewith should be agreed upon by the said parties, and such

agreement reduced to writing and signed by them. [43]

III.

These defendants further severally allege that the negotiations herein referred to between said Grays Harbor Company and said complainant were carried on in behalf of said Grays Harbor Company, during all of the times aforesaid, by the said Baldwin, who was then Chief Engineer of said Grays Harbor Company and by the Right of Way Agent of said company, but that neither said Baldwin nor said Right of Way Agent at any of said times had any power or authority to make any final or binding agreement with said complainant for the purchase of any lands for said Grays Harbor Company. That before any such final or binding agreement on behalf of said Grays Harbor Company for the purchase of such lands could be made, it was necessary that the same be accepted and approved by the General Officers of the said Grays Harbor Company. That said complainant at all times during the said negotiations well knew that neither said Baldwin nor said Right of Way Agent had any authority to make any final or binding agreement for the purchase of any lands for said Grays Harbor Company, and that before any such binding or final agreement could be made in behalf of said company, it was necessary that the same be accepted and approved by the general officers of said company.

IV.

That after the writing of said letter of June 9, 1909, set forth in paragraph IV of the bill herein, and the acceptance thereof by said complainant, said

Baldwin submitted to said complainant a map of a portion of said city of Hoquiam, showing thereon the lands and premises intended to be covered and referred to by the said writing, a copy of which map is attached to said bill of complaint, marked Exhibit "A." [44]

V.

That shortly after said June 9, 1909, the said H. F. Baldwin died, and one J. R. Holman thereupon became Chief Engineer of said Grays Harbor Company; that after the writing and acceptance of said letter of June 9, 1909, the officers of said complainant company and said Baldwin during his lifetime, and said Holman thereafter, together with one J. B. Bridges, the attorney for said Grays Harbor Company, had numerous conferences for the purpose of agreeing upon the terms and conditions relative to the purchase and sale of the lands intended to be covered by said writing, and shown upon the said map, and all matters in connection therewith. That said Bridges prepared and submitted to said complainant a draft of an agreement to be entered into between the said parties covering the said matters, but that said complainant refused to accept or agree to the terms of said draft of agreement so prepared and submitted by said Bridges, and the said complainant prepared, signed and executed a so-called agreement between the said parties, a copy of which is set forth in paragraph VI of said bill of complaint, which writing contained other and different specifications and agreements than those contained in the draft of agreement so prepared and submitted

by said Bridges, which other and different terms and conditions had never been agreed to or accepted by any of the officers or agents of said Grays Harbor Company during any of the said conferences between said companies, or otherwise. And thereafter said complainant sent the said so-called agreement so signed and executed by it to the said Grays Harbor Company at its offices in Seattle, Washington, with the request that the same be executed by said Grays Harbor Company. That said Grays Harbor Company refused to accept the said agreement so prepared and executed by said complainant, and refused to accept or accede to the terms [45] and conditions therein contained different from the said draft so prepared and submitted by said Bridges, and repeatedly notified complainant that it would not accept the same nor execute the said agreement so submitted by said complainant.

VI.

That thereafter said Grays Harbor Company, having refused to accept or execute the said agreement, the said complainant demanded a return thereof, and the said J. B. Bridges, who then had possession of said agreements, complying with the said demand of complainant, returned the said contracts to complainant, unexecuted by said Grays Harbor Company. That in returning the said contracts, said Bridges wrote said complainant a letter, a copy of which is set forth in paragraph VIII of said bill of complaint, but that the said Grays Harbor Company had accepted or agreed to a contract as so prepared and executed by said complainant, but that he did

mean by said letter that said Grays Harbor Company did not intend by the return of said so-called agreement to waive any right it might have to require complainant to make and enter into an agreement as contemplated by the said parties when said proposition of June 9, 1909, was made and accepted.

VII.

That thereafter numerous conferences were had between the officers of said complainant company and the said Holman and said Bridges, representing said Grays Harbor Company, concerning the terms and conditions of the said proposed purchase and sale, and the matters connected therewith, and the terms and conditions of the agreement which should be executed between the said parties relative thereto, which negotiations continued until the said conveyance and transfer of all the property and rights of said Grays Harbor Company to said Oregon Company, by the [46] said agreement and deed mentioned and referred to in paragraph XII of said bill of complaint. That during all of said negotiations, it was well known to complainant, and the fact was that said Holman did not have any power or authority to make final or binding agreement for said Grays Harbor Company to purchase any lands from complainant, but that before any such agreement could become binding upon said Grays Harbor Company, it was necessary that the same be accepted and approved by the general officers of said company.

VIII.

That after the said sale and transfer of the said property of the said Grays Harbor Company to the said Oregon Company in June, 1910, the said Ore-

gon Company, desiring to acquire lands in said city of Hoquiam, for railway right of way purposes, and for railway station grounds and yards, by and through the said J. R. Holman, who was during all of such times its Chief Engineer, had numerous conferences with the said complainant relative to the purchase of such lands for such purposes; that said Holman did not, during any of such negotiations, have any power or authority from said Oregon Company to make any final or binding agreement for the purchase of any of such lands, but before any such final or binding agreement could be made in behalf of said Oregon Company, it was necessary that the same be accepted by the Vice-president and General Manager of said company, which fact was at all times well known to said complainant. That such negotiations between said Oregon Company and complainant were continued until some time in the month of September, 1910, at which time all of such negotiations theretofore had between said complainant and said Grays Harbor Company and said Oregon Company, including the said proposition and acceptance of June 9, 1909, were by mutual agreement of the said parties, rescinded, [47] cancelled and terminated, and since said time, no negotiations have been had between the said parties relative to said matter, nor has any contract or agreement been made between them, and never since said time and *the* until the commencement of this action has the said complainant taken any steps, or given either of said defendants any notice of its desire or intention to enforce any alleged contract between complainant and either of said defendants, except that in June, 1911,

said complainant tendered to said Navigation Company certain deeds of property claimed by complainant to be covered by said writing of June 9, 1909, and then demanded a performance of a contract for the purchase of said lands which complainant then claimed had been theretofore entered into.

IX.

These defendants further severally allege that after the said termination of said negotiations, and the said cancellation and rescission of said proposition and acceptance, the said Oregon Company on or about the 23d day of December, 1910, sold and conveyed all of its lines of railway in the State of Washington and elsewhere, including said line of railway from Centralia, Washington, to Hoquiam, Washington, to the said Navigation Company, and since such conveyance, the said Oregon Company has not owned, constructed or operated, and does not intend to purchase, own, construct or operate any line of railway in said State of Washington. That after the said termination of said negotiations and the cancellation and rescission of said proposition and acceptance, the said Oregon Company, relying thereon, and upon the failure of said complainant to make any claim that any final or binding contract had been made between it and either of said defendants for the purchase and sale of any such property, or to notify either of said companies that it intended to make any such claim, [48] or to attempt to enforce any alleged contract between said parties, and believing that said complainant did not intend to claim that any final or binding contract had ever been made with either of these defendants for the sale or purchase of any lands

for said right of way, station and yard grounds, acquired other railway right of way, and railway station and yard facilities in the said city of Hoquiam, and has constructed its railroad over such new line into said city of Hoquiam; and neither of said defendants will ever require or be able to use the lands or premises, or any part thereof, intended to be covered by the said writing of June 9, 1909, for railway purposes, or for any purpose for which it desired to purchase the same, or is authorized and empowered to use lands under its Articles of Incorporation.

X.

These defendants further severally allege that it was understood and intended by and between the said complainant and said Grays Harbor Company that the said sum of One Hundred and Thirty-four Thousand Dollars ($134,000.00) should be paid to said complainant, as and for complainant's damage to other property adjoining that proposed to be purchased from complainant as aforesaid, by reason of the construction, maintenance and operation of a line of railway upon the said property, as well as for the purchase price of such land to be taken. That by reason of the fact that no line of railway has been or would be constructed or operated over the said premises which complainant now asks this Honorable Court to require these defendants to purchase, the said complainant would not suffer any damage to its said other property, as was contemplated in and by the said proposition of June 9, 1909, and to require these defendants to pay said complainant said sum of One Hundred and Thirty-four Thousand

Dollars ($134,000.00) for a conveyance of the said property, would compel these [49] defendants to pay complainant, and permit complainant to receive damages which it never has and never will sustain; that to compel these defendants to purchase the said premises for said sum of One Hundred and Thirty-four Thousand Dollars ($134,000.00), and separate the said premises from the other premises owned by said complainant in connection therewith, would require a severance of the title of said property in a manner which would necessarily be extremely prejudicial to these defendants, as well as to said complainant, with no corresponding benefit to either of said parties.

XI.

These defendants further severally allege that a further part of the consideration for which said Grays Harbor Company proposed to pay complainant said sum of One Hundred and Thirty-four Thousand Dollars ($134,000.00), was what said complainant, its officers and agents, should co-operate with said Grays Harbor Company and its successors, in procuring other necessary properties in said city of Hoquiam, and procuring from said city of Hoquiam proper and necessary franchises for the construction and operation of its railway in said city. And these defendants allege that said complainant did not at any time after making said proposition and acceptance of June 9, 1909, co-operate with or assist either of these defendants in procuring other properties in the city of Hoquiam, required or desired by these defendants, nor co-operate with them in procuring

necessary or proper franchises from said city of Hoquiam; but, on the contrary, the said complainant, at numerous times thereafter, opposed the applications of these defendants for franchises before the City Council of said city of Hoquiam, and in many ways hindered and obstructed these defendants in obtaining necessary and proper franchises from said city. [50]

XII.

That by reason of the facts hereinbefore stated, these defendants allege that said complainant should now be estopped to claim that any final or binding contract or agreement, with reference to the purchase and sale of any property, was ever made between complainant and said Grays Harbor Company, or said Oregon Company, or said Navigation Company; and that to grant the prayer of said bill of complaint, for a specific performance of any such alleged agreement, or to require these defendants, or either of them, to make or enter into any agreement with complainant, for the purchase of any property in said city of Hoquiam, as prayed for in said bill, would be unjust and inequitable.

WHEREFORE, these defendants, having fully answered, confessed, traversed and avoided or denied all the matters in the said bill of complaint material to be answered, according to their best knowledge or belief, humbly pray this Honorable Court to enter its judgment and decree that these defendants, respectively, be hence dismissed with their

respective costs and charges in this behalf most wrongfully sustained.

GRAYS HARBOR & PUGET SOUND RAILWAY COMPANY.

By BOGLE, GRAVES, MERRITT & BOGLE,
Its Solicitors.

OREGON AND WASHINGTON RAILROAD COMPANY.

By BOGLE, GRAVES, MERRITT & BOGLE,
Its Solicitors.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY.

By BOGLE, GRAVES, MERRITT & BOGLE,
Its Solicitors.

BOGLE, GRAVES, MERRITT and BOGLE,
Solicitors for Answering Defendants and of Counsel.

(Filed April 9, 1912.) **[51]**

Opinion.

GROSSCUP & MORROW, for Complainant.

BOGLE, GRAVES, MERRITT & BOGLE, for Defendants.

CUSHMAN, District Judge.

Complainant relies upon the following authorities:

Windsor vs. St. Paul &c Ry. Co., 37 Wash., 156;

No. American Trans. Co. vs. Samuels, 146 Fed., 51;

Bradley vs. Steam Packet Co., 13 Pet., 89;

Sultan Log. Co. vs. Great Northern, 58 Wash., 604;

Anderson vs. Lumber Co., 30 Wash., 147;
Moses vs. Bank, 149 U. S., 298;
Breasher vs. West, 5 Pet., 609;
McLean vs. Sellers, 120 Pac., 242;
Marvin vs. Lindbach, 80 Atl., 958;
Johnson vs. Tribby, 27 App. D. C., 281;
Willard vs. Taloe, 8 Wall. 557;
Morgan vs. Bell, 3 Wash., 570;
Pomeroy's Equity Jurisprudence, Sec. 842;

[52]

Frye on Specific Performance, Sec. 258;
Storer vs. Great Western Ry., 2 Young & Collier Chancery Rpts., 48;
Pembroke vs. Thorpe, 3 Swanston's Ch. Rep., 482;
Hawkes vs. Eastern Counties Ry., 22 Chancellor's Reports, 739;
Cathcart vs. Robinson, 5 Pet., 277;
Kentucky Distilleries &c Co. vs. Blanton, 149 Fed., 40;
Taylor vs. Insurance Co., 9 How., 390–405;
Eames vs. Insurance Co., 94 U. S., 621;

Defendants rely upon the following authorities:

Swash vs. Sharpstein, 14 Wash., 426;
Hite & Raffeto vs. Savannah Elec. Co., 164 Fed. 944;
Crossley vs. Maycock, 18 Eq. Cs., 180;
Clark vs. Davidson, 10 N. W., 384;
Ellis vs. Cary, 42 N. W., 252;
Brown on St. Frauds, Sec. 376;
Sorenson vs. Kizer, 51 Fed., 30;
Bailey vs. R. R. Co., 17 Wall, 96;

Blake vs. Co., 76 Fed., 654;
DeWitt vs. Berry, 134 U. S., 306;
Johnson vs. Lara, 50 Wash., 368;
Allen vs. Treat, 48 Wash., 552;
Hogan vs. Kyle, 7 Wash., 600;
Peters vs. Van Horn, 37 Wash., 550;
Morgan vs. Bell, 3 Wash., 554; 565;
3 Pom. Eq. Jur., Sec. 1410;
McKinney vs. Big H. & C. Co., 167 Fed., 770.

[53]

This cause is for decision upon the bill, answer, reply and evidence thereunder. The bill is one for specific performance. Complainant is, and was, the owner of a large amount of real estate in the town of Hoquiam, and otherwise interested in certain business enterprises at that place.

The defendant, Grays Harbor & Puget Sound Railway Company, was, in 1908, seeking to obtain an entrance for its road to Hoquiam, and to acquire depot and terminal grounds, right of way and franchises therein. The other defendants have succeeded to, or acquired interests from the Grays Harbor & Puget Sound Railway Company, the nature of whose rights and liabilities among themselves, it is not necessary to state. They will be mentioned herein as "defendants."

Through the chief engineer of said railroad company, it entered into negotiations with complainant, which resulted in complainant, in September, 1908, submitting three separate propositions to the defendant railroad company, through the latter's engineer. The second and third propositions were:

"'Simpson Avenue Line,' with depot grounds in Block 50. Across Northwestern Lumber Company's log pocket on the extension of Simpson Avenue, which is across Lot 1 of Tract 15, Plat 9, Hoquiam Tide & Shore Lands; thence across or along Levee Street, adjacent to Blocks 70, 62, 61, eighty-eight feet in Block 51 and two hundred and fifty feet, eleven inches, in Block 50, together with the return right of way through Blocks 62, 70 and 69, joining Northern Pacific right of way through those Blocks and through Lot 3, Tract 15, Plat 9, to Railroad Avenue along Twelfth Street vacated and adjoining Northern Pacific Track, to K Street. This right of way to be adequate for double trackage except on its return or switch track through Blocks 70, 69 and Twelfth Street. Also to include for depot grounds the East 182 feet of Block 50, all for the sum of $102,000.00, One Hundred Two Thousand Dollars."

"'Emerson's Proposition.' The same as Simpson Avenue Line omitting depot grounds in Block 50 and adding the East [54] half of Blocks 62 and 61 and eighty-eight feet on Levee Street by 100 feet in Block 51, you to join with the Northwestern Lumber Company dedicating 50-foot street along the center line of Blocks 61 & 62, for the sum of One Hundred, Thirty-four Thousand Dollars ($134,000.00)."

In June, 1909, this offer was conditionally accepted by a letter from the railroad company's engineer to complainant, stating:

"We beg to advise you that we accept what is called the 'Emerson' proposition, contained in your letter to Mr. H. F. Baldwin dated September 25th, 1908, being your proposition for One Hundred and *Thirty-four* ($134,000) *Dollars.*

"We will present you a map showing in detail such proposition and a formal agreement shall be entered into, pending actual transfers.

"However, we will expect and you shall give us your co-operation in procuring other properties in Hoquiam and also franchises in Hoquiam.

"You shall without delay furnish our attorneys with abstracts of title and our attorneys shall have twenty (20) days after delivery of abstracts within which to examine same, and upon our attorneys passing title, and delivery by you to us of proper deeds of warranty to such property, we will pay you the aforesaid sum. All buildings to be removed by you within six months from date of deed."

This, in turn, was accepted by the complainant. Thereafter a map was presented to complainant by the defendant's engineer. This map showed the location of a railroad bridge across the river in Hoquiam. Abstracts were, without delay, furnished the attorney of the defendant railroad company. These abstracts disclosed good title to the property, save in certain particulars, not material.

In June, 1909, the engineer of the defendant railroad company, who had conducted the negotiations,

died, being succeeded, July 1, 1909, by Mr. J. R. Holman. There were conferences between the representatives of the parties upon the terms and details of the formal contract, mentioned in the defendant's acceptance. [55]

The attorney for the railroad company and George H. Emerson, Vice-president of complainant, at length so far agreed upon a form of contract as to dictate a draft to complainant's stenographer, which was submitted to the President of the complainant company. It contained the following provision:

> "7th. It is agreed by the said first party and their officers, that they will co-operate with the said second party in procuring such franchises of the City of Hoquiam as it may desire and in procuring such additional rights of way in the City of Hoquiam as the second party may desire."

The President of complainant refused to execute the contract until another paragraph was inserted, providing:

> "8th. It is stipulated by the first party that the construction of the approach to the proposed bridge on the extension of Simpson Ave. shall be so arranged as to interfere with the handling of logs in their mill pond the least possible, and with that object in view that an ample span shall be placed West of the West pier of the drawbridge, and that the bridge abutment be placed as nearly as possible, consistent with the economical spacing of the spans of said bridge, and in accordance with the requirements

of the U. S. Government, about thirty ft. into the river from the line of the piles of the first party's pond as such piles are now driven. It is also further stipulated by the first party that such bridge may be a joint user bridge with the City of Hoquiam provided the City of Hoquiam contributes its share of cost of construction and maintenance."

The following provision was also inserted:

"1st. The said party of the first part for the consideration of $134,000.00, to be paid by second party, *Twenty Thousand Dollars of which is paid down by second party, the receipt* whereof is hereby acknowledged, and the covenants and agreements hereinafter mentioned * * * "

The contract, as then prepared, was on July 7, 1909, forwarded to the Railroad Company at Seattle by complainant; but was returned, unexecuted, July 21st to the attorney of the Railroad Company in Hoquiam, by Mr. Holman—who had, on July 1st, succeeded to the position of engineer for the railroad company, after the decease of Mr. Baldwin. This attorney, July 23d, advised complainant that the railroad company [56] would not execute the contract on account of its containing, in paragraph 8, the "common user" bridge clause.

Conferences were had between the officers of complainant and the attorney of the railroad company, trying to reach an agreement concerning the objectionable provision; but without being able to do so. Thereafter on September 15th, complainant demanded that the attorney for the railroad company

return this formal contract to it, which he did on the same day, with the following letter:

> "Per your request of this date I herewith hand you a proposed agreement between yourself as the party of the first part and Grays Harbor and Puget Sound Railway Company as the party of the second part, the same being with reference to the purchase of certain properties from you. Such agreement being dated July 7, 1909, and having been executed by you, but not by the Railway Company.
>
> "I consider that since this agreement has not been executed by the Railway Company yet you are entitled to have it returned to you, but by so returning to you it is not the intention of the Railway Company to waive any rights which it has with reference to the agreement to purchase this property and I anticipate that it is not your intention that the handing of these papers to you should have that effect."

The attorney testifies that the immediate surrender of the prepared draft being required, and having no time to confer with his company, he wrote this letter. Complainant made no answer to it, and negotiations were suspended.

The Railroad Company thereafter negotiated with the City authorities and with a so-called "Citizens' Committee" concerning the contemplated bridge. Officers of the complainant were present at certain of these negotiations, and its manager was accused, by defendants, of opposing the Railroad Company in this matter.

In June, 1910, the Grays Harbor & Puget Sound Railway Company sold all of its property to the Oregon & Washington Railway Company. At length, the Railroad Company, on September 9, 1910, reached an agreement with the "Citizens' Committee" concerning the bridge, by which it was provided [57] that it should not be a "common user" bridge.

After this matter was so arranged, the engineer of the defendant railroad, on the same day, notified the complainant that it was ready to take up the deeds to the property desired. Upon this request, Mr. Jones, the President of complainant, met with the engineer and attorney for the defendant railroad. There is a conflict in the testimony of these men as to exactly what took place at this interview. The attorney and engineer for the railroad company testify that Mr. Jones demanded $144,000.00 for the property, being $10,000 more than the price made in the accepted proposition, which the engineer refused, and that Mr. Jones informed them that it could not be had for less. Mr. Jones testifies that he represented to the engineer that the complainant should receive interest on the $134,000—the original price, for the length of time that had elapsed since the acceptance. Interest on $134,000, at six per cent, from June 9, 1909, to September 9, 1910, would slightly exceed $10,000.

It is probable that Mr. Jones demanded $144,000, and he probably called attention to the fact that interest during the delay would amount to as much as the extra amount demanded. Not only do the attorney and engineer testify that Mr. Jones made

a positive demand for the amount in excess of the agreed price, but Mr. Emerson, complainant's Vice-president, testifies that he understood Mr. Jones had made a demand for interest. The complainant has been, at all times, in possession of the property.

Complainant now contends that this was not a breaking off of negotiations, nor a refusal on its part to perform, but simply a request of its President that, before carrying out the contract, Mr. Holman submit to his superiors the claim [58] of complainant, that it be allowed interest on the purchase price. It cannot be so held. If such was the understanding of those present, or of Mr. Jones, the complainant's President, the matter would, in all probability, soon have been broached again, but this was not done.

In December, 1910, the Oregon & Washington Railway Company sold its property to the Oregon-Washington Railroad & Navigation Company. Defendant's engineer continued to treat with the city authorities and, at length, the railroad company entered into a traffic arrangement with the Northern Pacific, thereby obtaining an entrance into Hoquiam, and its trains came in over the tracks of that company. Upon learning which, complainant tendered deeds to the property to the defendant railroad company—reciting a consideration of $134,000—and demanded performance of defendant; and, upon refusal, instituted this suit to compel defendants to specifically perform the foregoing agreement.

A "common user" bridge would have been a benefit to complainant and its other property. Much

had, doubtless, been said in the negotiations concerning this bridge, but the evidence does not disclose an agreement. No mention is made of it in either of the letters containing the proposition and acceptance. And, when, by the provision contained in paragraph 8 of the formal contract, the complainant sought to bind the railroad company to a partnership with the city in a "common-user" bridge, it was requiring the making of a new contract and, whether this be viewed as showing that the minds of the parties had not really met, though, *prima facie,* it appeared by the original offer and acceptance that they had met; or as a refusal by complainant to perform—the refusal being put in the shape of a demand not contemplated—is all one, for the effect is [59] the same.

> "If we assume that the offer and acceptance is, *prima facie,* evidence of a contract, it is, of course, the contract embraced by the written offer and no other. What is to be inferred by the preparation and presentation by Nash of the formal writing differing in terms from the offer accepted? If he was acting in good faith, the writing prepared by him must be his interpretation and construction of the offer to sell which had been accepted, and if that be true, with the written offer before us, we would be forced to conclude that there was nothing to show that the sellers had made the agreement as construed by Nash. This would lead to the conclusion that the minds of the contracting parties had not met, and that, although the offer and

its acceptance was apparently a completed contract, the subsequent occurrences showed that, in fact, there had not been an agreement. But if the offer and its acceptance did, as matter of law, make a contract, it should not be held, and we do not hold, that the subsequent action of the buyer rescinded or canceled it. This plainly could not be done against the wishes of the sellers. Such action could not do more than extend to the sellers the opportunity to withdraw their offer.

"If, on the other hand, we infer that the offer was so plain that Nash must have understood its terms, and that the formal writing prepared by him does not present his construction of the offer, but that it is a counter proposition made by him, or an effort to obtain better terms than those embraced in the offer, what then should follow? If the offer and its acceptance was not binding on the buyer, it was not binding on the sellers; for it is axiomatic that, unless both are bound, neither will be bound. Bishop on Contracts, sec. 78. If the buyer was free to propose new terms, the sellers were free to decline them. In suggesting new terms, the buyer, in effect, said that the offer and acceptance was not final. If not final as to the buyer, it could not be conclusive as to the sellers, and they were free to withdraw from the negotiations. Bristol etc. Co. vs. Maggs, 44 Ch. Div. L. R. 618; Johnson vs. Latimer, 71 Ga. 470. See, also, Bellamy vs. Debenham, 45 Ch. Div. L. R., 481; s. c., on ap-

peal, 1 Ch. Div. (1891) L. R. 412. The buyer should not be permitted to treat the negotiations as open for the purpose of seeking better terms, and, at the same time, hold them closed so as to bind the sellers if they fail to accept the proposed changes. When it proposes a contract materially variant from the offer, it takes the position that the acceptance of the offer was not unconditional and conclusive. The contract for the breach of which this suit is brought is the offer to sell and the acceptance of the offer. If they stood alone, as we have said, they would contain apparently all the elements of a contract. It seems to us that we cannot be required to stop at the acceptance and refuse to consider what followed. Nash immediately proceeded to prepare the formal writing. It was ready for signing on the next day. If it could have been finished instantly when the offer was accepted, and if Nash could have handed the sellers his draft of the formal contract at the moment of acceptance, the acts all taken together would have meant an acceptance of the offer, with the understanding that it be construed to mean [60] what Nash proposed in the new writing. Clearly the first offer would not bind the buyer until it was unconditionally accepted, and the new writing would not bind the sellers, it containing new terms, until they agreed to it. Crossley vs. Maycock, 18 Eq. Cas. 180." Hite & Rafetto vs. Savannah Elec. Co., 164 Fed. 944, at pp. 951 and 952.

It was argued, on behalf of complainant, that the 8th paragraph was no departure from, or variation of the original contract; that it was only putting in form what the parties had agreed concerning one of those franchises to be asked from the city. It may have been complainant's understanding; but it is not shown that the railroad company so agreed, or understood. It is urged that the evidence as to those negotiations does not tend to vary the terms of the written contract, but only to disclose the subject matter referred to as "franchises in Hoquiam," mentioned in the railroad company's acceptance of complainant's proposition.

If it were conceded that "franchises in Hoquiam" might be shown to contemplate franchises in particular places in Hoquiam, and not such franchises as the railroad company then, or thereafter concluded that it desired, yet it would be an abuse of the exception to the rule to go further and hold that the particular form of franchise in contemplation was to be limited and burdened in the manner sought by the last clause of paragraph eight, and parol evidence to substantiate such claim, would constitute an unwarranted variation of the contract.

A formal contract was contemplated when the letter of acceptance was written. If the formal contract had been made, the preliminary arrangement made by letter would be *functus officio*—either the letters would, of necessity, have formed the contract, or the formal instrument would have done so. The letters disclose certain main considerations for the contract, but much of detail in them was left unex-

pressed, [61] as is disclosed by the provisions in the formal draft, concerning which there is no dispute.

These specifications, in the letters would hold the parties to the main provisions of the proposition, where they could not break them, or, if they did, it would be clear who was wrong. If, when they came to enter into a formal agreement, one side or the other refused to subscribe to one of these main propositions, the right of the matter could be easily determined. But when, in the preparation of the formal agreement, the parties find, although honestly striving, that they cannot agree on some matter unexpressed in the original agreement made by the letters, then the Court must conclude that their minds have not met. The formal agreement then becomes a prerequisite to the consummated contract. A breach cannot be determined because the parties, themselves, by providing, specially, for a formal agreement, have provided against the very thing that happened. If, when the letters were written, they considered it necessary to provide against this contingency, by requiring a formal contract, the Court cannot undertake to interpret the unconsummated agreement and make a contract for them.

It is further urged that the contract is not varied by paragraph eight; that it was a requirement called forth by the language of paragraph seven, the latter having been inserted at the dictation of the attorney for the railroad company; that paragraph seven is broader than the provisions contained in the original acceptance, which acceptance read: "franchises in Hoquiam," while paragraph seven reads:

"Such franchises of the City of Hoquiam as it may desire and in procuring such additional rights of way in the City of Hoquiam as the second party may desire."

Paragraph seven is not a substantial broadening or variation of the language contained in the acceptance. The [62] situation of the parties and the magnitude of the enterprise undertaken by the defendant render it unlikely that each and all of the franchises necessary to its undertaking had been determined upon by the engineer. It is more reasonable to think that the provision in the acceptance contemplated, not only franchises then deemed necessary by the defendant railroad company, but those which, in the progress of its undertaking, would be found necessary and desirable.

Literally, "franchises in Hoquiam" is broader and more comprehensive than "such franchises in Hoquiam as we may desire," for the former would include those desired and those not. The letter of acceptance did not fairly contemplate any limitation other than that the franchises should be in Hoquiam. The addition limited, rather than broadened the original language. The map mentioned in the acceptance and furnished complainant shows that a bridge was contemplated at the point in question. Therefore, the issue between the parties was whether the franchise for this bridge should be such as complainant desired, or as defendant desired. The latter is the more likely.

Parol testimony will be admitted to disclose the situation of the parties to a contract, but this is as far as the statute of frauds may be relaxed in allow-

ing evidence to make plain the contract.

While, doubtless, the more important franchise requirements had been determined upon, yet, at the stage at which the project then was, naturally, all franchises to be asked of the city could not be foreseen and, whether in fact they had been foreseen or not, an engineer of ordinary prudence would hesitate to act on the assumption that he had foreseen everything. It is, therefore, reasonable to conclude [63] that the language used in the acceptance must have been used in at least as broad a sense as that expressed in paragraph seven.

It is further concluded, as a matter of fact, that the objectionable clause in paragraph eight was insisted upon by complainant, as pointed out above, rather for its own advantage and protection—in a matter deemed necessary by it, than on account of the language of paragraph seven. The complainant could have protected itself against paragraph seven by stipulating that it be not required to co-operate with defendant for other than a "common user" bridge, without stipulating that the bridge be a "common user" bridge, thus binding defendant to accept a "common user" bridge.

It is argued that no demand was made upon the complainant to execute a contract, from which paragraph eight was omitted. As pointed out, one was prepared and submitted to complainant in which this objectionable paragraph was omitted. At the dictation of complainant's president, it was re-drafted to include paragraph eight and was, in that form, executed by him for complainant. The Vice-President of the complainant testifies that Mr. Jones, its Presi-

dent, only signed the contract containing the "common user" bridge clause, his testimony being as follows:

> "Q. Is it not a fact that the only agreement Mr. Jones was willing to sign was the one containing the bridge clause?
>
> "A. The only one he was willing to sign was the one he did sign, and it contained a bridge clause."

This sufficiently shows a refusal by complainant to execute a contract that did not include paragraph eight.

It is argued that the formal agreement called for in the acceptance is waived both by the letter of the attorney of the railroad, returning, unexecuted, the prepared draft, [64] and the conduct of the parties. So far as this letter is concerned, if it were conceded that the attorney had the authority to change the contract, he did not waive any right on account of a breach of the contract. If the prepared contract had simply been returned without comment or demand, no rights would have been waived. The attorney's letter no more than called the attention of complainant to the fact that no acknowledgment was made by the return of the demanded instrument of a changed situation, or the loss of any right on account of a breach, or otherwise, that the railroad had not surrendered any rights by the surrender of this paper.

In so far as the contention that the conduct of the parties constituted a waiver of the formal agreement is concerned, the evidence warrants no other conclusion than that, when they found that an agreement

could not be reached on account of the "common user" bridge clause, insisted upon by complainant, matters were left in abeyance—as each party desired the consummation of the entire transaction—while the railroad treated with the city in regard to the bridge, it being the plan of each to resume negotiations when the bridge question was settled.

Such conduct does not constitute a waiver of the formal contract. It might constitute a waiver of the time contemplated within which it was to be entered into. It is no more than saying "We cannot agree now. We will wait and see if we cannot agree later."

Nothing was done towards acceptance or performance by either party. It is argued that the removal of certain buildings from the land by complainant was such part performance as to take the contract out of the statute of frauds. These buildings were not moved at the request of the railroad [65] company. The acceptance provided that the buildings upon the land should be removed within six months from the date of the deeds.

The mere removal of buildings would not constitute such part performance of this contract as to take it out of the statute of frauds, because in the nature of things it could not be made to appear that it was solely done as performance and not for other reasons. Further, the evidence is not sufficient to warrant a finding that the defendant knew that they were being removed in performance.

Complainant contends that it was warranted in removing the buildings upon the assumption that the defendant would take the land, because it was known that the defendant railroad was continuing its nego-

tiations with the city of Hoquiam for its contemplated franchise. Complainant may have been influenced by this fact in the course pursued by it; but that fact does not give it any legal or equitable right against the defendant company. There was no privity between it and the city in this matter. The removal of the buildings would not be a sufficient part performance, in any event, to take the contract out of the statute of frauds.

> "By the weight of authority at this time the rule seems to be settled that in order to enforce specific performance of a parol contract to convey land, possession must have been transferred. The Supreme Court of the United States, in Purcell vs. Miner, 4 Wall. 513, decided in 1866, strongly support this doctrine. Pond vs. Sheehan, *supra,* decided by the Supreme Court of Illinois in 1890, holds that delivery is essential. Many other cases are cited in the opinion there rendered. Johns vs. Johns, 67 Ind. 440, holds likewise, and the Supreme Court of Pennsylvania, in the case of Pugh vs. Good, 3 Watts & S., 56 (37 Am. Dec. 534) holds that delivery of possession pursuant to the contract is the test of part performance. We shall not call attention to all of the cases so holding, but there is another line which, while not directly passing upon this question, holds that a part performance by one of the parties is not sufficient and that there must have been a part performance by the other party also. Some of them are Wallace vs. Long, 105 Ind. 522 (55 Am. Rep. 222, 5 N. E. 666); Austin vs. Davis, 128 Ind. 472 (25 Am. St. Rep. 456, 26

N. E. 890) and Ellis vs. Cary, *supra* (74 Wis. 176, 17 Am. St. Rep. 125, 42 N. W. 252). Swash vs. Sharpstein, 14 Wash. 426, at 436. [66]

Whether a formal agreement was waived by the defendant, either by its conduct at the time of the halting of negotiations, on account of a disagreement over the "common user" bridge clause, or upon the engineer's informing complainant's president that he was ready to take up the deeds, in September, 1910, is not important, as it is clear that the complainant, through its president, refused to perform its part of the contract and demanded $10,000 additional compensation to that agreed upon. The complainant's demand and refusal excused the defendant from making any further offer, as a useless formality, and it makes no difference whether the offer of $134,000 by defendant's engineer be considered as an assertion by him that the contract was still in force, or as an offer to pay the price before offered.

The complainant having refused to perform what it now claims was the contract, and the defendant having acquired other property for the purposes desired, it is now excused from performance and a rescission of the contract should be decreed.

For the reasons above stated, complainant was not entitled to anything in the nature of interest for the time of the delay. If complainant considered that it was entitled to interest, it could have protected itself by tendering the deeds, without waiving its claim to interest; but, when it made a demand for $10,000, additional, before the surrender of its deeds, it made a demand for such substantial additional compensation as to require a new contract to warrant it.

Having reached this conclusion, it is not necessary to consider the question of complainant's laches, based on its quiescence, after the refusal of complainant to transfer the [67] property for $134,000 and defendant's refusal to pay $144,000, during which delay the defendant had acquired other rights and property, giving it the desired entry into Hoquiam.

The bill is dismissed.

(Filed Nov. 7, 1913.) [68]

Final Decree.

This cause having heretofore come on regularly for hearing upon the bill of complaint, the answers of defendants, reply, exhibits and evidence, and the Court having duly considered the same, and the arguments of the solicitors on behalf of complainant as well as those of the solicitors on behalf of the defendants, is of the opinion and finds that the complainant is not entitled to any relief herein;

It is therefore ORDERED, ADJUDGED and DECREED, and the Court does hereby ORDER, ADJUDGE and DECREE, that the bill of complaint of the complainant herein be, and the same is hereby dismissed, and that the defendants and each of them go hence without day, and recover of the complainant herein their costs and reasonable disbursements herein taxed at the sum of $95.51 *Dollars.*

ORDERED, ADJUDGED and DECREED in open court this the 22 day of November, 1913.

EDWARD E. CUSHMAN,
Judge.

(Filed Nov. 22, 1913.) [69]

Abstract of Testimony.

BE IT REMEMBERED, that in the trial of this cause in the District Court before Honorable E. E. CUSHMAN, Presiding Judge, the complainant offered the following testimony:

[Testimony of George H. Emerson, for Complainant.]

GEORGE H. EMERSON (by deposition): Became acquainted with H. F. Baldwin, chief engineer of the Grays Harbor Railway Company, in September, 1908. Baldwin, with the Right of Way Agent and another person, came to my office in Hoquiam and submitted to me several different routes for their railway through property owned by the Northwestern Lumber Company, and asked me to make prices for the various rights of way submitted. I suggested an alternative arrangement, and submitted all the propositions in writing under date of September 25, 1908. This letter (Exhibit "A") was made a part of the evidence and is identical with the copy set forth in the complaint, to which reference is made.

"Q. Prior to the writing of that letter, Mr. Emerson, was there any discussion with Mr. Baldwin about the manner that the Railroad Company would cross the Hoquiam River at Simpson Avenue?

"A. Yes."

(The defendant objected to this question as incompetent and irrelevant.) **[70]**

"Q. Now, Mr. Emerson, what kind of a crossing do you refer to now with the City interested?

(Testimony of George H. Emerson.)

"A. A street crossing."

Early in October, 1908, at the request of Mr. Baldwin, I went to Seattle. In connection with Mr. Baldwin and Mr. Farrell, Vice-president of the Oregon-Washington Company, I examined the Hoquiam Terminal plans of the Railroad Company. As a result of that visit on my return I wrote the following letter to H. F. Baldwin, under date of October 24, 1908:

> "Propositions for the sale of property and release from damages from the Northwestern Lumber Company and Harbor Land Company include any release from damages for the crossing of tide land lots in front of Simpson Avenue on the East side of the Hoquiam River that these Companies may be interested in.
>
> The proposition for right of way along Twelfth Street vacated as heretofore submitted includes the privilege of crossing to the South side of the Northern Pacific right of way and building adjacent thereto on Lot 3, Tract 15, Plat 9, Hoquiam Tide and Shore Lands, to Railroad Avenue."

This letter was written to supply an omission in the original letter of September 25th, which omission was pointed out by Mr. Farrell.

Letter of June 9, 1909, set forth by copy in the complaint, was identified by the witness and introduced in evidence. The letter was signed at complainant's office in Hoquiam, Mr. Baldwin stated by the direction of Mr. Farrell.

(Testimony of George H. Emerson.)

Shortly after the signing of this paper, I delivered to Mr. Bridges, local attorney and I believe one of the trustees of the G. H. & P. S. Railroad Company, abstracts of title covering the land to be conveyed. Baldwin requested me to deliver the abstracts to Bridges. Afterwards Mr. Bridges said the titles were satisfactory. Prior to June 30, 1909, Bridges and Gordon, Right of Way Agent, met with me in my office at Hoquiam and we prepared a formal contract. This contract was sent to Mr. Jones, President of our Company. Mr. Jones made some changes and the draft of contract was again submitted **[71]** to the officers of the Railroad Company, Mr. Bridges and Mr. J. R. Holman, who had succeeded H. F. Baldwin, Baldwin having died about June 15th. On July 7, 1909, I mailed the following letter:

> "We enclose herewith duplicate copies of the agreement this day reached at Hoquiam, Wash., by your Company, represented by your engineer Mr. J. R. Holman, and our Company represented by our President, Mr. C. H. Jones. These copies have been duly executed by the Northwestern Lumber Company and one of them please have executed by your Company and return to us, together with remittance stipulated, twenty thousand dollars ($20,000)."

with duplicate agreement signed and acknowledged on that date by the officers of the Northwestern Lumber Company. This paper was introduced in evidence, and is identical with the agreement set

(Testimony of George H. Emerson.)

forth by copy in the complaint. This agreement was signed by Mr. Jones in behalf of the Company and was prepared in the presence of Bridges and Holman by their stenographer.

"Q. Did you at any time ever receive any notice from any officer of the Railway Company or from Mr. Holman or Mr. Bridges, in substance or effect, that this agreement was not satisfactory to the Railway Company?

A. Never."

Prior to this meeting with Holman and Bridges, was added, at the request of Mr. Jones, to the eighth paragraph the following:

> "It is further stipulated by the party of the first part that such bridge may be a joint-user bridge with the city of Hoquiam, provided the city of Hoquiam contributes its share to the cost of construction and maintenance."

This sentence was incorporated in the agreement with the consent of Mr. Holman and Mr. Bridges.

"Q. Was there any conversation with them at that time as to whether or not any other kind of a bridge would be satisfactory to the Northwestern Lumber Company?

"A. I think it was, at all times, fully understood and so discussed between us that all we desired was a street crossing, and that there was no stipulation as to the kind of a bridge, other than that it was agreed to build a satisfactory bridge.

"Q. Was this understanding to be in the nature

(Testimony of George H. Emerson.)

of a consent that it might be a joint-user bridge, if a satisfactory bridge could not be agreed upon?

"A. Yes." [72]

There were certain maps and franchises filed with the officers of the city of Hoquiam by the Railway Company. I saw the maps. I expressed to both Bridges and Holman the willingness of our company and its officers to assist the officers of the Railroad Company in getting franchises.

Witness identified Exhibit "G," being letter signed by Bridges under date of September 15, 1909, which was introduced in evidence.

This letter is set forth by copy in the complaint. This letter was the result of a telephone conversation in which I told him that the signed agreement should be in our hands, to which he consented.

"Q. Does the last paragraph of his letter, then, express the substance of your verbal understanding over the telephone?

A. Yes.

"Q. That is to the effect that both parties recognized the validity of the agreement?"

(The defendant objected to this question because leading.)

"Q. What was the substance of your conversation over the telephone?

"A. The withdrawal of the agreement was simply that it should be in our hands instead of theirs, pending their preparation to comply.

"Q. Were you given any reason by Mr. Bridges or any other officer of the Railway Company for the

(Testimony of George H. Emerson.)

company's delay in signing the agreement which had been executed by your company?

"A. Never.

"Q. Have you been given any reason since?

"A. Never."

After July 7, 1909, in pursuance of the negotiation to sell this property, our company began the construction of a new store building instead of the store building we were occupying, and I built a house to take the place of the one I was occupying which was to be removed. Both the residence and store building were included in the property sold under the contract. We moved several [73] buildings which were on the property and refused to lease others, so that the buildings stood vacant from that day to this. We built the new store building on the back part of Block 51 in such a way that the spur from the proposed railroad would serve the building. The nature of the business required railroad trackage. The location of this new store building is not such as we would have chosen except that we expected the railroad to be built according to the plan. This store building was commenced about September 1, 1909.

"Q. After September 25th, 1909, what occurred between yourself and the officers of the railroad company, with reference to the terminal plans of the company, including your own interests at Hoquiam? What did you personally do with reference to these terminal plans of the railroad company?

(Testimony of George H. Emerson.)

"A. Negotiations were continued between the City Council and the railroad, with reference to reaching an agreement as to the bridge or bridges that were to be erected, and in that I was chairman of the committee for a while.

"Q. In that connection, what were your offers?

"A. To secure such an arrangement as would be satisfactory to all parties concerned.

"Q. Did you at any time during those negotiations relating to franchises, crossing of river, or any interests, or the vacation of streets, or any other public rights, oppose any plan authorized or adopted by the railway company?

A. No, sir.

"Q. A memorandum signed June 9th, 1909, contains this clause, 'However, we shall expect and you shall give us your co-operation in procuring other properties in Hoquiam, and also franchises in Hoquiam.' Have you had any request in pursuance to that request from the officers of the railroad?

"A. No. In conversation with Mr. Bridges, we told him we held those things in abeyance until the signing of his contract.

"Q. What things were held in abeyance?

"A. The procuring of right of ways and franchises.

"Q. Until the signing of what contract?

"A. The contract for right of way through the Northwest Lumber Company's property.

"Q. Have you at any time been willing and ready to facilitate the railroad company in procuring prop-

(Testimony of George H. Emerson.)

erties at Hoquiam, and franchises at Hoquiam?

"A. Always." [74]

On June 13, 1911, I tendered to Mr. Farrell four deeds, Exhibits "H," "I," "J," and "K," offered in evidence. These deeds correctly described the property as the same is described in the agreement under date of July 7th, signed by the Northwestern Lumber Company, and set forth in the complaint. Deed "K" of the Harbor Land Company, a controlling interest in which was owned by the Northwestern Lumber Company, covers the property described in my letter of October 24, 1908, supplementing the original proposition. I have never received any intimation that these deeds were not satisfactory in form.

"Q. Mr. Emerson, in fixing the price of the property, which you intended to sell at One Hundred and Thirty-four Thousand (134,000) Dollars—was any consideration given to benefits and damages as well as the question of value of the property to be conveyed?

A. Yes—very decidedly.

"Q. How was the final lump sum fixed—by negotiation or fixed by yourselves?

"A. It was fixed by ourselves.

"Q. Was there any segregation of damages, benefits or value of property?

A. No.

"Q. Would the building of the railroad, according to the plans of the company, as shown to you at Seattle, be a benefit to your company?

(Testimony of George H. Emerson.)

"A. It would have been a very great benefit.

"Q. Were there, or were there not any damages affecting your property?

"A. Yes—there were. It was injured somewhat at the mill, and it would necessitate the entering into of great expense in clearing the property of buildings, etc.

"Q. Not having the testimony of the defendants, and in order that this testimony may cover the whole case, I will state to you, Mr. Emerson, that the defendants, in their answer, in substance, state that a large part of the consideration named to be paid for this property, was in the nature of damages to your property over and above benefits. What have you to say in that connection?

"A. I should consider that the greater part of the consideration was an advantage to our other property. [75]

"Q. Why did you fix this price at One Hundred and Thirty-four Thousand (134,000) Dollars, and was it in consideration of damage to your other property in part or in whole?

"A. The consideration of benefit to our property in one place and damage to our property in other localities.

"Q. To what extent did the cost of damages of the property to be conveyed enter into it?

"A. I am unable to say."

On cross-examination the witness testified as follows:

I do not think we would have accepted an offer for

(Testimony of George H. Emerson.)

that property for any purpose at any figure less than the figure at which we offered it to the railroad company. At the time of our original interview with Mr. Baldwin on the 23d or 24th of September, 1908, I think Mr. Gordon, the right of way man, and Mr. Bridges were there.

"Q. I understood you to say that at the time of that conference there was some discussion about bridges crossing the river. What was said in regard to that?

"A. We said to Mr. Baldwin that any negotiations of this kind must be subject to the approval of the city, in order to establish a highway bridge at that point—I mean a joint user bridge."

"Q. Was it your understanding, and Mr. Baldwin's understanding, at that time that that was a condition or stipulation in your negotiation?

"A. Mr. Baldwin stated there would be no trouble.

"Q. In the proposition you submitted two days later, was there any reference to the bridge?

"A. No.

"Q. Were there any other conditions under discussion between you and the railroad representatives other than those expressed in your letter and the letter of acceptance?

"A. There was some talk about the crossing from our store to our warehouse, which was satisfactory to them.

"Q. Was that to be put in the agreement?

"A. No, I think not."

(Testimony of George H. Emerson.)

After this proposition was submitted in September, 1908, I went to Seattle in October, 1908, for a further conference, at which Mr. J. D. Farrell was present. I understood the proposition had to be submitted to him. After that nothing was done until June, 1909. **[76]**

"Q. Now, you stated that about the 7th of July, Mr. Bridges and some other parties came to your office, and a formal agreement, called for by your previous correspondence, was drawn at that time—who were present?

"A. Mr. Holman, Mr. Bridges and Mr. Jones, President of our company, and I think the right of way man, Mr. Gordon.

"Q. Was Mr. Jones present at the time Mr. Bridges dictated the draft of the agreement?

"A. I believe he was.

"Q. Did not Mr. Bridges dictate there in your presence the draft of the agreement which was submitted to you and left with you?

"A. I think there was an agreement drawn between us—dictated there to my stenographer by Mr. Bridges and written by the stenographer.

"Q. What became of that draft?

"A. It was sent to Mr. Jones and disapproved by him.

"Q. Why was it sent to Tacoma?

"A. He was not present at that meeting.

"Q. Was that on the 7th of July?

"A. No, it was not—we signed the agreement on 7th of July.

(Testimony of George H. Emerson.)

"Q. The agreement, which Mr. Bridges dictated in your office to your stenographer, and which Mr. Jones subsequently refused to sign was dictated in the presence of Mr. Holman and yourself and probably Mr. Gordon—was it not?

"A. I think it was.

"Q. And your company refused subsequently to execute that agreement?

"A. Mr. Jones insisted upon changing one clause. The clause which Mr. Jones insisted upon changing related to the building of a bridge in conjunction with the city of Hoquiam.

"Q. Was the agreement dictated on the the 7th of July signed?

"A. It was agreed to and was satisfactory to all parties present.

"Q. What became of the original draft dictated by Mr. Bridges?

"A. Mr. Bridges dictated both of these.

"Q. What became of the draft originally dictated by Mr. Bridges in the presence of yourself, Mr. Holman and Mr. Gordon?

"A. I do not know. It was written out and sent to Mr. Jones at Tacoma.

"Q. Now, Mr. Emerson, is it not a fact that this agreement, which [77] was signed was one prepared by Mr. Jones and not by Mr. Bridges?

"A. This agreement was prepared in our office in the presence of the parties mentioned, and was satisfactory to those parties.

"Q. Were there two meetings?

(Testimony of George H. Emerson.)

"A. It is my impression there were two meetings.

"Q. Were Mr. Holman, Mr. Bridges and Mr. Gordon present at all of them?

"A. I think so, either all of them, or a part of them —Mr. Bridges was there.

"Q. Is it not a fact that you were notified that the railroad would not accept the agreement with the bridge clause, and that is the reason they refused to sign?

"A. Never. They never notified us.

"Q. Did not Mr. Bridges notify you?

"A. No—never. The position of the company was such that they could have required of us a deed at any time in strict accordance with the proposition made and accepted by Mr. Baldwin.

"Q. This bridge clause was not in that proposition, but was added by Mr. Jones and was the only agreement he ever signed or tendered—is this not right?

"A. Yes. This was modified, however, to the extent that it was not binding on either party.

"Q. Is it not a fact that the only agreement Mr. Jones was ever willing to sign was the one containing the bridge clause?

"A. The only one he was willing to sign was the one he did sign, and it contained a bridge clause.

"Q. Who was Mr. Jones?

"A. Mr. Jones was President of the Northwest Lumber Company.

"Q. About the 25th of September, 1909, some four or six weeks after that agreement had been signed

(Testimony of George H. Emerson.)

by your company and delivered to Mr. Bridges—you requested Mr. Bridges to return it to your company. Did you not?

"A. Yes, it was agreed between Mr. Bridges and myself that we were to be the custodians of the agreement.

"Q. You knew at that time, then, that they refused to sign the contract in that form?

"A. They never notified me.

"Q. Did you ever inquire of Mr. Bridges or of Mr. Holman, or any representative of the railway company, why they did not sign it? [78]

"A. I do not think I ever did. If I did, it was an evasive reply.

"Q. Why do you say that if you did, it was an evasive reply, if you do not remember ever making the inquiry?

"A. In an understanding with myself, it seems to me the railroad were simply holding up until such time as they could arrange that bridge, and that was why they were not signing the contract. Negotiations began immediately for the arrangement of the bridge, that would be satisfactory to the city of Hoquiam and myself. These negotiations were with the city of Hoquiam.

"Q. Then you were mistaken in your previous answer when you stated that no reason was given for their refusal to sign that agreement?

"A. I guess I was mistaken.

"Q. You know that the refusal was account of the bridge clause therein? A. Yes.

(Testimony of George H. Emerson.)

"Q. That agreement was returned to you about the 25th of September, 1909, was it not?

"A. I think so.

"Q. From that time until June, 1911, when you tendered these deeds, what actions or negotiations were taken, or had by you, looking to the closing up of this alleged contract?

"A. I dropped out of this business about that time, and negotiations were continued between the city and the railroad until an agreement was finally reached and signed to the effect that each would build a separate bridge, that they would build their piers at the same time, and the other bridge when they saw fit. That was about the ninth of September, 1910.

"Q. You refer now to the final adjustment between the railroad company and the city on the question of the bridge crossing the Hoquiam?

"A. Yes.

"Q. In all these negotiations you had been assisting the city, had you not?

"A. No, I dropped entirely out of it, after the failure to have the original agreement signed. I was away most of the time. I was chairman of the citizens' committee in August, 1909. It was about that time that Mr. Jones was insisting upon the bridge clause in the agreement The committee's position was that of trying to bring harmony between the two different parties and working in the interests of all concerned. [79]

"Q. Now, Mr. Emerson, after this bridge matter

(Testimony of George H. Emerson.)

was adjusted, which you say was in August, 1910, did your company then offer to execute the agreement between the railroad company eliminating the bridge clause? A. We at all times stood willing.

"Q. Please answer the question as I put it.

"A. I cannot tell you, as I was not present and do not know what action was taken."

The negotiations were in charge of Mr. Jones from September, 1909.

The deeds tendered in June, 1911, expressed a consideration of $134,000. I had no definite knowledge of any change of plans on the part of the railroad company until they came into Hoquiam with their railway trains about May 1, 1911. It was immediately after that we took up negotiations and insisted upon the carrying out of the contract.

"Q. At the time you tendered these deeds to the railroad company, did you not know that the railroad company had acquired rights over the N. P. track into Hoquiam, so that they would not need your property?

"A. We had no definite knowledge. Up to that time we never doubted the fulfilment of the contract.

"Q. Was that the reason you abated your demand for interest on the $134,000?

"A. My answer to that question would be that we were willing to accept the original purchase price without interest, and so decided in our council.

"Q. When?

"A. At the time we made out the deeds.

(Testimony of George H. Emerson.)

"Q. You had heard that the railroad had acquired a right of way into Hoquiam in some other manner?

"A. After, we heard a rumor to that effect.

"Q. Prior to that time your company had refused to accept $134,000 to convey the property, had it not?

"A. Not to my knowledge—Mr. Jones attended to that. I do not know that a counter offer was ever contemplated.

"Q. You stated in your direct examination that your company stood at all times to convey this property in accordance with the terms of the letter of September, 1908, and the acceptance in June, 1909. You do not mean to say that during all that [80] time your company stood ready to convey that property to the railway company for $134,000, do you?

"A. I mean to say that if your company had come forward and given us a definite proposition to pay us that much, that in my judgment the board of trustees of the Northwest Lumber Company would have accepted.

"Q. Then the demand made by Mr. Jones for a higher sum was based simply upon a desire to get a little more out of the railroad if he could?

"A. Mr. Jones stated he was entitled to it, and I have no doubt such would be the opinion of the Court."

We did not vacate the buildings on July 9, 1909, the very day the contract was signed. The lease ran for a short time and we refused to renew the lease. One was a hotel and one was a boarding-

(Testimony of George H. Emerson.)

house. These leases expired two or three months after July 9, 1909. We did not know at that time that the company would refuse to sign the agreement.

"Q. It was returned to you, unsigned, on your demand in September?

"A. The refusal to sign the agreement was simply in abeyance; that is to say, it was held up until satisfactory negotiations were arranged with the city. You were in a position to force us to a deed any moment you wanted to.

"Q. Did you not understand, Mr. Emerson, that they were not bound to purchase the property? That you had no binding obligation against them to purchase the property until they signed the agreement which your company signed and sent to the Railroad Company for its signature?

"A. They considered that we were bound by the Baldwin agreement, and that this was only carrying out the terms of the Baldwin agreement."

We began construction of the store about September or October, 1909. I do not know whether the agreement had been returned to us at that time. I built a house in place of the house I was occupying, which is still on the property. The original store is still on the property.

On re-examination, witness testified:

After we sent the agreement of July 9, 1909, to the Railroad Company they never offered a substitute and never transmitted us an agreement in different form. They never offered to execute [81]

(Testimony of George H. Emerson.)

an agreement different from the one of July 7th, and never made any request upon us to execute an agreement which would eliminate the so-called "Bridge Clause."

On recross, he testified:

"Q. Mr. Emerson, you have before stated that Mr. Bridges, in the presence of Mr. Holman and Mr. Gordon, tendered an agreement substantially similar to the one which you executed under date of July 9th (7th), except that it did not contain the bridge clause.

"A. I think that is true, but I cannot tell you exactly.

"Q. You have also stated Mr. Holman told you subsequently that the reason the Railroad Company would not execute that agreement dated July 7, 1909, was because of their objection to the bridge clause. It that not correct?

"A. That I think was held in abeyance awaiting adjustment with the city.

"Q. I understood you to say in answer to my previous interrogatories that it was the presence of the bridge clause which prevented the Railroad Company from signing it. A. Yes.

"Q. Did you not understand that the agreement without the bridge clause, which was the same as the one drafted or dictated by Mr. Bridges, was the agreement which the Railway Company contended should be executed? A. I think so.

"Q. The situation then was that through Mr. Bridges a contract was tendered on behalf of the

(Testimony of George H. Emerson.)

Railroad Company to your company, acting through Mr. Jones, and your company then tendered the contract of July 7th, containing the Bridge Clause, which the Railroad Company refused to sign, and the matter stood in that shape from July 7, 1909, until the tender of your deeds, in June, 1911?

"A. The Railroad Company held up their signature pending the negotiations with the city, was the statement made to me." **[82]**

[Testimony of C. H. Jones, for Complainant.]

Complainant produced the testimony of C. H. JONES, taken by stipulation before an examiner.

I reside in Tacoma. I have been President of the complainant, Northwestern Lumber Company, since 1901, and own control of the stock. The proposition for right of way for the Grays Harbor and Puget Sound Railway Company came up in September, 1908. Mr. Baldwin discussed three propositions for right of way and easement through Hoquiam and our property. One proposition crossed the river south of the shingle mill on Railroad Street; another north of 8th Avenue; and another was going across at Simpson Avenue, with depot grounds on Block 50. We considered their propositions and talked over about opening the property across Simpson Avenue with Mr. Baldwin, and we suggested that he go across there and place the depot on Blocks 61 and 62. That was the Emerson Proposition designated in the letter to Mr. Baldwin under date of September 25, 1908. Our talk with Mr. Baldwin

preceded that letter, and at that time we had before us the maps of the city of Hoquiam.

"Q. At that time was there anything said about a bridge across the Hoquiam River on Simpson Avenue?

"A. Yes, sir, that was the first talk. That was the way that we suggested it to Mr. Baldwin, that there would have to be a bridge across there; that we had always contemplated a bridge there and the city needed it for its connections with East Hoquiam and the main part of the city. We always considered that, and it was part of the talk with Mr. Baldwin that the bridge would have to be across there, and talked about different kinds of bridges.

"Q. What was said on the subject?

"A. That there would no objection to that; that it could be arranged very easily. Some suggested a double deck bridge, but it was thought that would put every thing up in the air too high; and there were other kinds of bridges discussed. It was left in that way, for us to make our proposition to them, which Mr. Emerson and I did submit in this letter of September 25, 1908."

The letter referred to is the letter identified by Mr. Emerson in his testimony.

The testimony relative to conversations with Mr. Baldwin relative to the bridge or other terms prior to the written agreement [83] objected to as incompetent, irrelevant and immaterial.

At the time of this talk with Mr. Baldwin, I was acquainted with Mr. J. B. Bridges, attorney for and

(Testimony of C. H. Jones.)

one of the trustees of the Railroad Company. We received a counter proposition from Mr. Bridges by letter, made Exhibit "D," which we rejected by letter made Exhibit "E." I had a personal interview with Mr. Baldwin on June 9, 1909, at our office in Hoquiam, at which there was present Mr. Baldwin, Mr. Bridges, and Mr. Gordon, their right of way man, and I think Mr. Isaacs, an engineer.

"Q. You may state what was said at that interview.

"A. That they were compelled to accept the proposition called the Emerson route; and there were a great many matters discussed at this time, and there was also the matter of the bridge question, which always entered into the whole matter and was one of the elements which was considered when we were making prices for the right of way and property what the railroad was to have. * * * Mr. Baldwin was anxious to get a reduced price from our asking price of $134,000, but finally he came around and asked me if we would take $20,000 less. I told him we had given it a great deal of thought and considered all the advantages and disadvantages and so on; and that was as low a price as we could make. Well, he said, he would take it. He said he had a telegram from Mr. Farrell from San Francisco to close the deal for the right of way from the Northwestern Lumber Company on the best terms we can, 'if we have to give them their price,' or something to that effect. He tried to get a reduced price."

This Baldwin agreement was dictated to our sten-

ographer in our office and I signed the acceptance at the same time. Mr. Emerson attended to the matter of furnishing the abstract, "and conferred with Mr. Bridges, and I did not see the paper until after it was ready." I received a draft of a formal agreement at Tacoma, either from Mr. Bridges or Mr. Emerson, and wrote to Mr. Bridges about it, and notified him I would be in Hoquiam within a few days.

> "A few days later I went to Hoquiam and went over the terms of the agreement and descriptions and everything, as I recollect. I went over to Mr. Bridges' office, or else it was there, and we read it over together there, Mr. Bridges and I, and I told him at that time that everything was all right with the exception that they had not any clause in there in regard to a bridge in connection with the city. He said, 'We can insert that in a few minutes,' and he went [84] off and wrote the clause which stated that the city might have a common user bridge by paying its proportion of the cost and expense."

That is the clause in the form of contract which I signed. He did not object.

"Q. Did you state to Mr. Bridges any reason why you wanted that clause in that agreement?

"A. It was,—we did not want to be on record in any other way. That was for the city and the railroad company as to what they should do. We wanted a bridge clause there, and we were only insisting that the city ought to have a right to say

(Testimony of C. H. Jones.)

whether it wanted one or not, or to go in there with them, and we thought that it would be no more than fair to have that clause in there. I did not want the city to think that we were against them.

"Q. As I understand, you mean to say that you told him you did not want to be in a position to interfere with the city insisting upon a bridge across there?

"A. We wanted it so it would be left to the city and the railroad company as to that, and we thought it was worded so that the railroad and city should agree upon it.

"Q. As I understand then, what you mean to say is that the substance of what you told him was that you did not want to be in a position to interfere with the negotiations one way or the other between the Railroad Company and the city?

"A. Yes, that is it. We wanted the city to act free and the railroad also."

Mr. Holman was there at the time, or just previous to that anyway. The agreement was signed by me the day of this interview, July 8th or 9th, 1909. Since that time I have received no notice from the Railroad Company of any intention not to carry out the contract signed by me at that time. Our company has at all times been willing and ready to carry out that contract.

"Q. What in your opinion has your company lost by reason of this agreement having been entered into, and what you have done toward carrying out that, if finally the railroad does not build in accordance

with the plans as exhibited at the time this agreement was made?

"A. We have lost a whole lot of money; we have a lot of property there that would have been more valuable."

We have been delayed in making necessary improvements and putting up buildings in connection with our sawmill operations, [85] both in extension of planing mill and lumber sheds, as we were anxious to have the tracks located first. We wanted to place our buildings at the most advantageous place. We would not have built any such class of store as we have if it was not expected to be on the main thoroughfare where people travel, and, in fact, we would not have built the store at all; we would have gotten along with the store we had at that time for a few years and saved all that money which was invested in that. If we were going to build a store with the railroad not there, we would not have erected it on that corner. Of course, there is some value to the building, but it is not of any value at all in comparison with what it would be on the main street where the travel is and where we have other property that we could just as well have built on. It was expected that there would be a sidetrack to serve this store. Once in Seattle I went with Mr. Holman over the grounds with him about the tracks and depot buildings, and he said that there would not be any trouble about getting a sidetrack in the rear of the store. I should say this was in September or August, 1910. He gave me no intimation at that

(Testimony of C. H. Jones.)

time nor at any other time that the contract was not to be carried out. Don't know whether we told him right out and out that we were building store and incurring other expenses, but he must have known it. I think about that time our foundations were all in there. The day the agreement was reached between the committee of the Commercial Club and City Council and the Railroad Company I had a telephone message to go to Seattle and meet Mr. Holman; that they expected to close the agreement. It was the same day the agreement was closed respecting the bridge.

"Q. State what occurred at that interview.

"A. I went to Mr. Holman's office, and he said he had just finished with the Hoquiam city committee, and the citizens' committee of the Commercial Club in regard to the bridge matter, and that they were each going to build a separate bridge. I told him I was glad they had settled on something, but that I thought it was a mistake that they did not have a common-user bridge. He went on to say, 'We can now fix up with you.' [86] I told him I was glad of that; that we had not changed our price or anything, but I thought we ought to have interest, and he said, 'You are the authority as to that,' or something of that kind. We talked about one thing and another, and I think we talked about the sidetrack to the store at the same time again, and he wanted to know how much interest and what it was on, and I told him I didn't know but I thought we should have interest on the amount; that they had

(Testimony of C. H. Jones.)

kept us out of it so long; that we wanted to give them all the time they needed; all that they needed to fix up the interest, and he said he could not do anything in regard to interest,—and would have to drop the matter. I said to think it over, and that was all that was said in regard to the interest or about settling up with the Northwestern Lumber Company. There was the agreement and they had to carry it out.

"Q. What interest did you ask him for?

"A. I did not ask him for any interest; I said I thought we ought to have interest.

"Q. From what time?

"A. I didn't know whether he ought to pay us on the full amount or on the two cash payments. It was not anything that we would be hard about anyway.

"Q. In other words, there was no attempt at computation of the interest?"

Mr. BOGLE.—That is objected to as leading.

"Q. Now, then, have you been prepared at all times since the 20 days after the 9th of June, 1909, to carry out this agreement and deed to the railroad company the land according to the memorandum?

"A. Yes, at all times.

"Q. Have you held the property subject to the terms of that agreement at all times?

"A. It has been at all times ready to be turned over to them, or we would vacate at any time they notified us.

"Q. Have you been ready at all times to make conveyances according to the terms of your agreement?

(Testimony of C. H. Jones.)

"A. Yes, sir.

"Q. I will ask you whether or not you gave me authority and employed me in this litigation to offer to deposit with the railway company such conveyances as would comply with that agreement if this deed tendered did not strictly comply?

"A. Yes, sir.

"Q. And have you been prepared at all times to carry that out? A. Yes, sir.

"Q. And are you ready to do so now? [87]

"A. Yes, sir.

"Q. Have you the ability to do so now in so far as you have not disposed of any of the property?

"A. Yes, sir; we have not."

On cross-examination the witness testified as follows:

The Baldwin agreement of June 9, 1909, was prepared and signed in the company's office at Hoquiam. My next interview with any officers of the Railroad Company was either at Mr. Bridge's office in Aberdeen or the Lumber Company's office in Hoquiam, after the original draft of the agreement had been sent to me at Tacoma. I was not present when this original draft was prepared. Mr. Emerson attended to that. I have no personal knowledge of what took place when the original draft was prepared. That original draft as sent to me at Tacoma by Mr. Emerson did not contain the Bridge Clause.

"Q. How did that Bridge Clause get in there?

"A. It came in there from Mr. Bridges. Mr. Bridges of Aberdeen had it when I went over the

(Testimony of C. H. Jones.)

final agreement with him.

"Q. How long after it had been sent by Mr. Emerson to you at Tacoma?

"A. I would think it was three or four days.

"Q. And this interview where the Bridge Clause was inserted in that agreement was held between you and Mr. Bridges in Aberdeen?

"A. Yes, sir, at his office.

"Q. Who was present?

"A. I do not know that anyone was present but Mr. Bridges and his son.

"Q. You insisted upon putting that clause in the agreement, didn't you?

"A. I only called the attention of Mr. Bridges to it, and he said, 'Certainly.'

"Q. Isn't it a fact that you declined to sign the original draft which was sent to you by Mr. Emerson because it did not contain the Bridge Clause?

"A. No, sir, there were other things that we changed. [88]

"Q. What other things?

"A. I wrote to Mr. Bridges in regard to 9th Street. They wanted 9th Street closed and we could not allow that because that would shut off all traffic between our store and warehouses, and would almost cut off our business, and we arranged that clause so that it would read that the Railroad Company would have the right to lay tracks and so forth, but that they should not be allowed to have it blocked, and that the police should have authority there to see that it was not blocked, or something of that kind.

(Testimony of C. H. Jones.)

"Q. The absence of the Bridge Clause was one of the reasons you did not sign the original draft?

"A. No. It only came up here for my inspection as to the whole thing.

"Q. It came up for your signature, didn't it?

"A. No, sir, but so that when I came down there it could be signed up.

"Q. Was it your suggestion or your demand that that Bridge Clause was put in the agreement?

"A. My suggestion; that was all; no demand about it.

"Q. You wanted it in?

"A. All the talk was that it should be in.

"Q. And you wanted it in that agreement?

"A. I wanted that the city should have a chance to use their privilege, or have a chance to decide whether they wanted to go in on that common user bridge.

"Q. You wanted to bind the Railroad Company but leave the city to decide whether it would want it or not?

"A. No, I wanted to leave it so that they might have a common user bridge if it were desired. It would bind the city, not the railroad.

"Q. You could not bind the city? A. No.

"Q. If you could get the agreement signed it would bind the railroad; isn't that what you were seeking?

"A. No, sir, I was seeking to have them trade equally.

"Q. Couldn't they trade without your interven-

(Testimony of C. H. Jones.)

tion, or having the clause in your agreement about it?

"A. I don't know whether they could.

"Q. Would your putting that clause in there enable the city and the railroad to trade on any more equal terms than if the clause was not in your agreement? [89]

"A. I don't know but what we may as well have left that out.

"Q. It would have been much better to leave that out if you wanted the matter left entirely between the railroad and the city, wouldn't it?

"A. It does look that way.

"Q. Now, isn't it a fact that you insisted on that going in there so that the railroad would be compelled under that agreement with you to build a joint user bridge with the city?

"A. I didn't insist that it should go in. I said that the talk had always been for a common-user bridge, and he knew it as well as I did, and it didn't need any insisting, but was a suggestion. It had been left out.

"Q. Wasn't the purpose you had in suggesting that it go in there to bind the railroad company to agree to a joint user bridge with the city?

"A. No. It was only so that the city and railroad could agree if they wanted to. If they didn't agree, it would not amount to anything. I could not insist upon it.

"Q. If the railroad in its agreement with you, as one of the conditions of purchase of your property, agreed to construct or enter into an agreement with

(Testimony of C. H. Jones.)

the city for a joint user bridge, they could not buy your property without living up to the agreement, and wasn't that the object you had in putting it in there?

"A. I don't think so. I think it was so that the city could see that the Northwestern Lumber Company was going back,—(interrupted by counsel).

"Q. Was that agreement redrafted with that clause in there by Mr. Bridges in his office at Aberdeen the day you refer to? A. Yes, sir.

"Q. Was it signed by you on behalf of your company at that time?

"A. I don't know whether it was signed right there or taken back to our office. I think it was taken back to our office at Hoquiam; I couldn't tell. I know the Northwestern Lumber Company did their part."

I signed it on behalf of the Northwestern Lumber Company and Mr. Emerson send it to Seattle.

"Q. Isn't it a fact that Mr. Bridges told you that he did not think the Railroad Company would agree to that clause?

"A. No, sir, he did not say anything of that kind.

"Q. There was nobody present but you and Mr. Bridges? A. That is all. [90]

"Q. Did you leave a copy of the agreement as redrafted with Mr. Bridges?

"A. No, I think it was taken over by us and one sent direct to the Grays Harbor and Puget Sound Railroad Company.

"Q. But the typewriting and stenographic work

(Testimony of C. H. Jones.)

in the redrafting of this agreement was done in Mr. Bridge's office in Aberdeen?

"A. Yes, sir; that is all there was to it; just to add that clause that the city may, by paying its proportion of the cost and expense of operating, have a common user bridge.

"Q. Did you rewrite the whole agreement, or just add that clause at the bottom?

"A. Just added that clause.

"Q. You did not rewrite the agreement?

"A. No. We may have rewritten that one page.

"Q. Didn't you know from that time on that the reason that the Railroad Company would not sign the agreement was the presence of this Bridge Clause in it?

"A. I don't think that was it. I think they were trying all the time to arrange with the city.

"Q. But didn't you understand all the time that the reason they did not sign this agreement, which had been signed by you, was the presence of this Bridge Clause?

"A. There was never anything came to me from any of the officials of the Railroad Company."

It may have come to me, being my impression of something of that kind, but there was no notice.

"Q. But you knew as a matter of fact that was the reason the Railroad Company did not sign that agreement and return it to you, didn't you?

"A. No, because Mr. Bridges in his letter when the agreement was returned, did not want this to act in any way as against the Railroad Company to take

(Testimony of C. H. Jones.)

that property, and we always considered that the Railroad Company had that property and could compel us to make a deed at any time.

"Q. But you are wandering into argument.

(Question read.)

"A. I did not know what the reason was for a long time, and I don't know as I did then.

"Q. Did you ever inquire why they did not sign it? A. No, sir, I never inquired.

"Q. It ran then from July, 1909 up to the spring of 1911 after [91] you had signed the agreement and the railroad had refused to sign, and you never even inquired why they refused to sign; isn't that correct? A. That is correct; I never did.

"Q. And you do not know why they refused to sign? A. Only as I surmised.

"Q. What was your surmise, and what did you base it on? A. That they had not signed it.

"Q. But what was your surmise as to the reason?

"A. That was the excuse that they offered; they had no other excuse.

"Q. What was the excuse?

"A. They did not give me any.

"Q. But you say that was the excuse?

"A. Well that was the excuse I imagined they offered.

"Q. What is that?

"A. The clause in regard to the bridge being in that agreement.

"Q. Then you did understand or believe that the reason that the Railroad Company refused to sign

the agreement was because of this Bridge Clause in it. Isn't that correct?

"A. I hardly know how to answer that question. In a reasoning way to myself I reasoned it out that that was it, but there was no official of the Railroad Company or Mr. Bridges or any of them who ever said anything to me.

"Q. But you believed that was the reason?

"A. I must have believed it; it came to me.

"Q. But you did believe it?

"A. I don't know whether I did or not. I considered all the time that the Railroad Company did not want to give up their side of the agreement so but what they could claim that the Northwestern Lumber Company should execute their part of it; even stated so by Mr. Bridges; that it should be in our hands instead of theirs.

"Q. But notwithstanding all that delay, you are not willing to say you knew that they were refusing to sign because of the presence of the Bridge Clause?

"A. I say they never notified me or our company in any way of anything of the kind. We may have heard it in talk. Mr. Bridges or someone may have talked to somebody and we got it or some intimation, but there was never any notice to me or to our company that that was the reason they did not sign. I never asked what the reason was. [92]

"Q. Now, isn't it a fact that you didn't ask because you knew, or thought you knew, that they were refusing because of that Bridge Clause?

"A. No, I thought that they and the city would

(Testimony of C. H. Jones.)

agree to something and that it would come about in good time.

"Q. And that they would eliminate this clause?

"A. Yes.

"Q. Then you knew that was the reason they would not sign it?

"A. Well, I guess they thought we did."

I held an interview with Mr. Holman in his office at Seattle in September, 1910, on the day that the Hoquiam Committee and the railroad agreed concerning the bridge. It was after the agreement had been reached between the city and the railroad.

"Q. Who was present?

"A. Nobody but Mr. Holman.

"Q. Wasn't Mr. Bridges present?

"A. No, sir.

"Q. Now, isn't it a fact that Mr. Holman in that interview, in the presence of Mr. Bridges, told you that they had adjusted the bridge matter with the city and that would eliminate any controversy between the company and his company, and he was ready to close the deal at $134,000?

"I think Mr. Holman stated he was ready to close it.

"Q. And you told him that you would not carry it out for $134,000; but that you had to have interest?

"A. No, I don't think I told him that. I told him I thought we ought to have interest.

"Q. And he said he would not pay interest?

"A. He said he could not do that; he did not say he would not.

(Testimony of C. H. Jones.)

"Q. You still insisted on interest?

"A. I told him to think it over.

"Q. Do I understand you say he would think it over? A. No, I said that.

"Q. Isn't it a fact that Mr. Holman at that time told you he was ready to carry out that agreement at $134,000 and pay the money, and when you insisted upon an additional amount by way of interest he stated he would not pay any additional sum and said he would declare the deal off? [93]

"A. He may have said that, but I didn't understand it that way. I thought we were talking about the interest, as to whether they would pay interest.

"Q. Didn't you understand when you left his office there at that time that he had declared the deal off because you had refused to carry it on at $134,000? A. No, I didn't.

"Q. And you don't remember that Mr. Bridges was present at that time?

"A. I don't remember that Mr. Bridges was present. It seems to me that Mr. Gordon was there.

"Q. Now after that interview neither you nor any other official of your company, so far as you know, ever called upon the Railroad Company to carry out that contract prior to the time the Railroad Company made its arrangements for operating over the Northern Pacific tracks into Hoquiam, did they?

"A. I think not. I don't think anything was done.

"Q. This interview was in September, 1910?

"A. Yes, sir.

(Testimony of C. H. Jones.)

"Q. The Railroad Company began operating into Hoquiam over the Northern Pacific along in September, 1911? A. Yes sir."

No official of our company called upon the railroad company to carry out the original contract at any time after this interview with Holman in September, 1910, until Mr. Emerson tendered the deeds in June or July, 1911, after we heard they had arranged to operate over the N. P. tracks. Mr. Emerson, through Mr. Griffin, of Seattle, went to the Railroad Company in June or July, 1911. It was after we had information of the arrangement with the Northern Pacific. It came in a roundabout way. We took no steps in the matter until the deeds were tendered by Mr. Griffin when we learned of the arrangment with the Northern Pacific. No formal agreement was ever tendered after the signing of the agreement which I signed. The Railroad Company did not ask me to eliminate the Bridge Clause from the agreement which I signed. In my conversation with Mr. Holman in his office in 1910 when the matter of interest was talked about I did not [94] understand that he did not intend to carry out this agreement about purchasing the property at Hoquiam. I thought he was talking more in regard to interest, and that they would take that up again. The dispute was about interest. I did not in any manner agree to a termination of the contract. I had no conversation with Mr. Holman after the one in his office in September 1910. The talks with reference to a spur track had been prior to that time. [95]

[Testimony of E. O. McGlaughlin, for Complainant.]

Complainant further produced the testimony, taken on stipulation before special examiner, of E. O. McGLAUGHLIN.

I am manager of the Northwestern Lumber Company. I was a member of the Citizens' Committee to consider the application of the Railroad Company for a bridge on Simpson Avenue. There was an application for a franchise pending. The Committee was appointed, some by the Commercial Club and some by the City Council, soon after this application for a franchise was made by the Railroad Company. A month or two after that, after the committee was appointed, Mr. Emerson was away and the mayor appointed me to take his place as a member of the committee. This must have been some three or four months after the application for a franchise by the Railroad Company. I served upon the committee until the agreement was reached in September, 1910. There were eight or ten consultations with representatives of the Railroad Company. In all these conferences there was never a suggestion on the part of the officials of the Railroad Company of opposition to the highway bridge at Simpson Avenue. The Railroad Company, after the first two or three conferences, stated all the time that they had agreed to that arrangement and were satisfied with it.

"Q. What kind of an arrangement?

"A. An arrangement by which the city would grant the railroad a site for the crossing at Simpson

(Testimony of E. O. McGlaughlin.)

Avenue, to cross the river.

"Q. What was the form of expression used generally in connection with that proposed bridge?

"A. For a long time the only talk was a common-user bridge, but after the matter had been discussed a number of times it was suggested that perhaps it would be better for each to build its own bridge. I think that suggestion came from Mr. Adams first, as I remember it, he was fearful of the financial obligation the city would have to assume if they had to build this kind of a bridge."

Mr. Adams was a member of the committee. The suggestion of two bridges, side by side, was finally worked out between the engineers of the city, Mr. Maughmer and Mr. Holman. This [96] was the suggestion finally agreed upon by the committee and everyone. During the earlier stages of the discussion the principal demand on the part of the railroad was the assurance on the part of the city that the city would finance their part of the bridge. That was in fact the only item or matter of argument or complaint on the part of the railroad company at first. And then the committee felt that they had sufficient assurance from the citizens that some arrangement would be made to finance the project, and the details were then gone into. At one meeting in the engineer's office at Hoquiam, Mr. Farrell was present. Mr. Farrell, Mr. Bridges and Mr. Holman represented the Railroad Company; Messrs. Adams, Maughmer and myself, the city. The discussion was much the same as at other

(Testimony of E. O. McGlaughlin.)

meetings, as to the financial ability of the city to carry their part, and as to the division of the cost. I remember saying to Mr. Farrell that I was surprised at the attitude of the railroad company in trying to put the city to the bad, or something of that kind, or to get advantage of the city, when they should be friendly and help work together. The reply was that the attitude of the Citizens' Committee was to put an unfair portion of the cost of the bridge on the Railroad Company, and the discussion was along those lines. We had begun at that time to talk about two separate bridges. I remember Mr. Farrell agreeing with me that the Railroad Company should give the city a full share of the street, and that the railroad should move up the river a little. At one of these meetings I recall a conversation with Mr. Holman about encroaching upon the Northwestern Company's burner. I spoke in the discussion there about the arrangement of these bridges and the division of space, and if the narrow bridge was allowed to come to the center of the street it would not leave sufficient room for the highway [97] bridge between the center of the street and the Northwestern Lumber Company's burner and slip, and that the Northwestern Lumber Company would object to an arrangement of that kind and Mr. Holman in my judgment showed a little temper in the matter. He resented the bringing in of the Northwestern Lumber Company's interest into the matter and gave me to understand that I was representing the city and not the Northwestern

(Testimony of E. O. McGlaughlin.)

Lumber Company in the negotiations.

"Q. What did he say?

"A. He said that they had their arrangements with the Northwestern Lumber Company and did not care to go into that discussion."

The agreement between the Citizens' Committee and the railroad was reduced to writing and signed. Which agreement was thereupon produced, marked Exhibit "B" and introduced in evidence, and is as follows:

A contract between the Citizens' Committee, signed by McGlaughlin, Mourant and Maughmer, and Grays Harbor & Puget Sound Railway Company, signed by Holman, under date of September 9, 1910, the substance of which exhibit is that the Railway Company would build a lift bridge on one side of Simpson Avenue and that the city and Railway Company will join in building the piers of sufficient length to enable the city to build a lift bridge on the other side; the city to have the right to proceed with its construction of the bridge wherever it chooses, but to join in the construction of the piers.

"Q. Now, after the execution of this agreement between the city and Mr. Holman, do you know of anything further being done with reference to the pending franchises before the City Council?

"A. I think not. There was a map or plat of these proposed bridges prepared, and I saw it in Mr. Maughmer's office, but I am not at present of the opinion that we held any meetings about it after

(Testimony of E. O. McGlaughlin.)

the one at which the agreement was arrived at."

[98]

Through all these negotiations I was acting for the city and not at the request of the Northwestern Lumber Company. It was the general understanding at the Northwestern Lumber Company's office that we were to assist the railroad in any way we could. I don't remember of being particularly requested to assist in the passage of that ordinance or any ordinance. I never personally was so requested.

The witness here identified a map of that portion of the city of Hoquiam embracing the property of the Northwestern Lumber Company and the Simpson Avenue crossing, which was introduced in evidence to illustrate the situation, and is made a part of this record. The lands owned by the Northwestern Lumber Company are shaded. The black portion represents the proposed new street referred to in the correspondence, also Blocks 61 and 62, which were to be deeded to the Railroad Company. The red represents the land and properties to be used by the Railroad Company for right of way. The yellow represents the ends of streets which the Railroad Company wished to use.

About the time, or shortly before (See p. 68, Jones' tes.) this bridge agreement was entered into, I had a talk with Mr. Holman in the city of Hoquiam relating to sidetrack to the store building which we were about to build.

"I asked him, under the proposed arrangement

(Testimony of E. O. McGlaughlin.)

with the railroad, if we built the building as indicated, showing him the map, whether or not we could get our spur from his railroad to the back part of the store and warehouse, and he replied that we could very nicely. That was the substance of it."

I informed him at that time of the plans of our company relating to the store building. I marked out on the map and showed him where we were proposing to build and where we needed the track. The railroad had at that time at Hoquiam a local engineer, Mr. [99] Isaacs, who was about there off and on. While the store building was being built I saw Mr. Holman at various times on the trains, and in his office at Seattle and at Hoquiam and talked with him.

"Q Did anything occur which enabled you to say whether or not he knew that the Northwestern Lumber Company was proceeding to arrange its property in view of the contract?

"A. He certainly knew we were doing it.

"Q. State what leads you to believe that.

"A. The talk I had with him about the spur track, and the talks at various times. He was there at various times and saw the work.

"Q. What work was going on?

"A. The building of this store building of the Northwestern Lumber Company, and we were going to move off the land that was proposed to be conveyed to the Railroad Company. The store was building and we moved around the houses in the

(Testimony of E. O. McGlaughlin.)

next block to make room for the houses we would have to move off from this land."

I am familiar with the accounts of the Northwestern Lumber Company.

"Q. What expenditures has the Northwestern Lumber Company incurred in view of carrying out the contract with the Railroad Company, if there existed such a contract?

"A. They spent a large amount of money. For the new store about $38,000; for fixtures about $7,000; for new wharf about $4,000; for new warehouse on this wharf about $4,500; for the moving of these buildings referred to, about $2,700.

"Q. And in addition to what they actually expended, what has the company lost by reason of its efforts to carry out this contract, by way of damages or otherwise?

"A. By reason of the carrying out, or getting ready to carry out the contract, and the failure of the railroad company to carry out their part as expected, the loss has been considerable. This store building is now on a side street, whereas if the railroad had been built as planned, it would have been in the direct line of travel from the business portion of the town to the depots,—passenger and freight depots. If we had known that this railroad was not to be built, and it became necessary to build a new store, which it would probably at some time, we could have gone to another place, at the corner of 7th and I Streets, where we have a large lot in the center of the business part of town, and with trackage with

(Testimony of E. O. McGlaughlin.)

the present railroad, the Northern Pacific, and a place for dockage which would have been very much better for our business, and the location would justify the expenditure of the money we did expend in a wrong direction. I would say the damage on that account would be $25,000. **[100]**

"Q. On account of building the store in a wrong location as a result of these improvements?

"A. Yes, in excess of the value that is now demanded.

"Q And what other expenditures?

"A. The expenditures on the adjoining block to prepare about moving these houses; I would say about two thousand dollars damages; and the loss of rents, because we could not rent our property located on the land that the Railroad Company was expected to use that would amount to about twelve hundred dollars. And the delay and damage to the lumber business because we were unable to formulate or carry out our plans on account of the delay in locating, and the arrangements by the railroad company, would amount to probably ten thousand dollars. We were held up there for more than two years and could not make any improvements or conveniences for our business. The wharf was built back of the store because under the present arrangements with the store in the wrong place, the distance to the store was so great that we had to build more wharf room."

I figure the total at about forty-three thousand dollars.

(Testimony of E. O. McGlaughlin.)

"Q. When was the first knowledge that you had that the Railroad Company did not intend to carry out this agreement according to its terms?

"A. The first notice I had was reading in a newspaper that an arrangement had been made between the Railroad Company and the Northern Pacific by which they would use the Northern Pacific tracks and bridge at Hoquiam."

That was in the summer of 1911, two or three months before they actually began to use the tracks. I think they actually began on the 23d of September. I first knew about it a couple of months before that. No notice was ever given to me or to the company, so far as I know, that the Railroad Company did not intend to go ahead with their plan as shown on the maps filed with the city. If such a notice had been served or given, it would have come to me, sure; either to the Northwestern Lumber Company or to the Citizens' Committee, because I was chairman of that committee. I had charge of the mill of the Northwestern Lumber Company. I was the only representative at Hoquiam at that time and the only man who was constantly there in charge of the business. I had no knowledge of what took place between Mr. Holman and Mr. Jones in Seattle. [101] I heard nothing about it.

(On Cross-examination.) Mr. Jones was President of our company. I had no knowledge of any controversy. I had nothing to do with the negotiations of the Lumber Company with the Railroad Com-

(Testimony of E. O. McGlaughlin.)

pany. I substituted Mr. Emerson as a member of the Citizens' Committee. That was primarily for the purpose of bringing about some agreement for a joint user bridge by the Railroad Company and the city. The city council had asked the assistance of the citizens in negotiation this franchise and crossing in order that the city might save the crossing for the city at Simpson Avenue.

"Q. What you had in mind at that crossing was to bring about a joint user bridge?

"A. That was the first proposition, yes."

I don't know that the bridge item alone was what brought the committee into existence. I think the Mayor and city council thought that it was a matter of much importance to the city and wanted the citizens to share in the negotiations and take some responsibility. I don't know anything about the insertion of the Bridge Clause in the agreement. Those agreements were made between Mr. Emerson, Mr. Jones and the railroad officials without my knowledge.

"Q. Didn't you know at that time that your company was insisting that the railroad should agree to a joint user bridge with the city across the river?

"A. No, they favored it, but I don't think they were insisting upon it. Not to my knowledge.

"Q. And you, as a member of this committee, favored it? A. Yes, sure.

"Q. You didn't understand that the Railroad Company wanted a joint use, did you?

"A. A joint user bridge,—the Railroad Company

(Testimony of E. O. McGlaughlin.)

first agreed to a joint user bridge.

"Q. But what I ask you is whether the railroad as an initial proposition preferred or wanted a joint user bridge? Isn't it a fact that the Railroad Company preferred to have its own bridge?

"A. I think likely that is true.

"Q. A joint user bridge was a suggestion coming from your committee or the citizens? **[102]**

"A. The committee was appointed by the council with the understanding that under no circumstances must the city be permitted or allowed to lose their crossing; they must preserve it to the city, and would not grant any franchise under any other plan. The Committee was given to understand that by the city council and the mayor when they were appointed.

"Q. How long was it after that agreement (referring to the bridge agreement of September 9, 1910) was entered into before your company commenced to construct this store you speak of?

"A. Well, they had just about had it started then —the actual work. We had been preparing plans and we started along in August or September, 1910. I cannot recall the exact time when the actual work was begun."

The other work was going along about the same time. The dock was constructed later. The piles of the dock were driven in the spring of 1911—the winter and spring. The dock building was completed along about September, 1911. The work on the dock was prosecuted continuously but with a

(Testimony of E. O. McGlaughlin.)

small crew. More than $2,000 was expended unnecessarily in removing buildings. We really wasted a couple of thousand dollars we ought not to have spent, as the buildings bring little more rent. The $700 was the enhanced value.

"Q. You speak of a loss of twenty-five thousand dollars on account of the wrong location of your store. Can you itemize that loss?

"A. No, that is only an estimate and would be my judgment. It is simply placing quite a large investment in a place where it is at a disadvantage. It is not in the right location."

The business is about as good as it was before. The store is a substantial building and cost about $37,000, and is larger than the old store building, and a better building.

"Q. How do you figure out that you have lost twenty-five thousand dollars if your business is as good now as before?

"A. We have invested our money in the wrong place. If we were to build a big store building in a desert somewhere, it would all be lost."

With the increased investment we should have a bigger business. The ten thousand dollar item I spoke of was "delays and inability to carry on to advantage the lumber business." We could not build sheds because they were to locate new tracks, and could not handle our [103] business to advantage on account of the bad conditions. The business is constantly growing and changing and we have to meet these things.

(Testimony of E. O. McGlaughlin.)

"Q. Your plant arrangements and plans were all as good as before these negotiations?

"A. Excepting that they were getting worn out and run down somewhat.

"Q. You mean you lost $10,000 during those two years because you did not make changes that you would have made?

"A. Yes, we could have run to better advantage if we had been able to prepare ourselves and fix our plant as it should be."

After our information that the railroad was operating over the Northern Pacific we put in an addition to the building we had on Third Avenue. After the bridge agreement was made we built out to the line where the bridge would come. That is our planing-mill. Since then we have had to put up big lumber chutes and fix the tracks. We went at it as soon as we knew about it. Mr. Holman resented what he considered my interest in the Northwestern Lumber Company, when we were considering the bridge agreement at one of the meetings in Seattle; either the meeting at which the two bridges were agreed upon, or shortly before that; one or two meetings before that, either in September, 1910, or a little before that. "Mr. Holman objected to my lugging in the Northwestern Lumber Company's affairs; that they had been already settled and he did not want any more trouble about it." He seemed to resent my assuming to represent both the Northwestern Lumber Company and the city at the same time. That is the way I looked at it.

(Testimony of E. O. McGlaughlin.)

"Q. It is a fact, isn't it, that as a member of the committee you took the side of the city in the matter of the joint user bridge?

"A. Well, I felt that the city should have the crossing, but I was very anxious to complete this arrangement so that the Lumber Company's affairs would be settled and we could go ahead and carry out our plans.

"Q. But the point I asked about is this; isn't it a fact that in those negotiations you took the side of the city on the questions that were under negotiation between the city and the Railroad Company? **[104]**

"A. Yes, I was to represent the city in my position on the committee.

"Q. And where there was a question between them as to the plan or expense, you were urging the city's end of the contention?

"A. My argument was favorable to the city.

"Q. And you were urging the city's part of it in the matter of a joint user bridge?

"A. Well, we did not hang on to the joint user bridge after the engineer suggested two bridges; the city members of the committee decided that perhaps the city could put in their piers first, and would not be required to raise all the money necessary to complete the bridge; only enough to put in the ends.

"Q. But you urged and insisted upon a joint user bridge from the beginning of the negotiations until you found that the city's proportion would be a pretty expensive proposition, and then it was that you agreed to the separate bridges?

(Testimony of E. O. McGlaughlin.)

"A. No, that is not true. I thought a joint user bridge would be the best for both concerns, and used my efforts and arguments to that end, both with the railroad and the city, and I still believe that would have been a very nice solution.

"Q. But you did agree subsequently to separate bridges?

"A. I did because that seemed to be the consensus of opinion,—that we could settle up the matter and come to an agreement on that line."

Before we really arrived at any agreement on the division of expense, the change to two bridges had been suggested or talked of or argued for by some member of the committee, so that really the other negotiations were never carried to an issue.

On re-examination the witness testified that no structures have been put on this property which was to be conveyed to the railroad company. The lumber company has at all times been in a position to turn the property over to the railroad company since June, 1909. Had it not been for this contract with the railroad company, the money spent in the store building would have been invested to very much greater advantage and would have been much more valuable. We put in a lot of money on the side street which should be put on the main street. The property would **[105]** be worth twenty-five thousand dollars more to-day if it had been located without reference to these railroad plans. That is what we have lost by reason of the contract through the building of the store.

(Testimony of E. O. McGlaughlin.)

Recross-examination.

"Q. The railroad did not control you in any way in locating your new store?

"A. The railroad did not have anything to do with the location except this contract to be carried out. The railroad had everything to do with that.

"Q. You expected the railroad would build that line, and therefore you located your store with respect to the main travel? A. Yes, sir.

"Q. But the railroad did not suggest where to build the store?

"A. Except by their plans,—what they proposed to do.

"Q. You could have built it on this other lot you spoke of if you had wanted to?

"A. Oh, there was nothing to prevent it, or anything done to hinder us." **[106]**

[Testimony of P. J. Mourant, for Plaintiff.]

Complainant further introduced the testimony of Mr. P. J. MOURANT, taken by stipulation before the special examiner.

I was mayor of Hoquiam from May, 1910, to July, 1911. I was a member of the committee appointed by the Commercial Club to consult with a committee of the council in regard to certain franchises applied for by the railroad and in relation to the city giving the railroad a right to place a bridge across the river. I became a member of this committee in the fall of 1909. An ordinance was filed with the council, but I do not know the date. The committee was appointed within about thirty days

(Testimony of P. J. Mourant.)

after that. After I was mayor we held several meetings with the railroad representatives. I was on the council prior to becoming a member of the committee, but not after going on the committee. It was generally understood, prior to my becoming a member of this committee, by the people, the citizens of the town, that the city would have to build a bridge at Simpson Avenue. In fact, the council, I would judge about three or four years before, instructed the engineer to make application to the War Department for a permit to put a bridge in there. The first meeting I can recollect was held in the city council chamber in the early part of the summer of 1910, at which were present, representing the railroad, Mr. Bridges, Mr. Holman, and Mr. Isaacs. Isaacs was the resident engineer. The discussion at that time was the cost of a joint user bridge. The railroad company submitted plans of two separate styles of bridges; one was a lift-bridge, similar to the one we are building here in Tacoma; the other was, I think, a rolling lift-bridge. They submitted terms, costs, and about the proportion the city should bear at that time. The discussion at that time between the railroad company officials and the committee was as to the city's portion of the cost for that common user bridge, and it seemed to be the opinion of the committee that the railroad company was placing the city's share of **[107]** the cost at too high a figure.

"Q. Was there any request on the part of the railroad officials in that negotiation with the com-

(Testimony of P. J. Mourant.)

mittee, or a suggestion of an exclusive railroad bridge built in such a way that the city could not use it; that is, a bridge at Simpson Avenue?

"A. No, sir, not as I understood, although at that meeting I believe that I personally suggested that probably the railroad company had placed the city's share of the cost at such a figure to discourage the city from joining in the building of the bridge, but they claimed they did not, and claimed they had employed engineers to get up the plans, and instructed them to figure out the city's and the railroad company's portion, and that it was not their figures, but the engineers' figures, who were designing the bridges.

"Q. Was there anything said at all by the railroad officials which suggested any intention or desire to avoid building a common user bridge?

"A. No, they denied at all times in our meetings that they were opposed to the city getting a crossing there. I would not say that they were not opposed to the common user bridge, because they suggested that the city build a bridge across there also, alongside of them, that is, a separate bridge."

That meeting was held at the council chamber at Hoquiam. Afterwards we met at Seattle, at which there were present Mr. McGlaughlin, Mr. Maughmer, city engineer, Mr. Wright, chairman of the street committee, and myself. Representing the company there was Mr. Holman and other O. & W. officials. I believe Mr. Murray, their resident bridge engineer at Seattle, was there. At that

(Testimony of P. J. Mourant.)

meeting an agreement was arrived at which was reduced to writing and signed.

"Q. During that discussion at Seattle was there anything said by Mr. Holman about the particular location of this bridge with reference to the burner of the Northwestern Lumber Company?

"A. Not by Mr. Holman, as I understand. In that agreement they were to build a bridge on the north side of the center of the street, and allow the city of Hoquiam to put in their substructure or piers on the south side, and at that time they wanted to claim the right of way to the center of the street. As I understand, Mr. McGlaughlin of that committee, suggested that on account of the city bridge being wider than the railroad bridge, it would crowd the bridge against the Northwestern Company's burner and interfere some with their log slip, and Mr. Holman stated that he [108] did not think that they were dealing with the Northwestern Lumber Company; that they had settled with them, and it was a case of making a deal with the city.

"Q. Now, after this agreement was signed by the committee, what more was done between the railway officials and the city with reference to either the bridge or the pending franchise?

"A. None that I know of.

"Q. From the time, then, that this bridge agreement was executed, September 9, 1910, did the railway officials request the city officials in any way to act upon the pending franchise?

"A. Not to my knowledge.

(Testimony of P. J. Mourant.)

"Q. When was the first knowledge that you as mayor of Hoquiam had that the railway company did not propose to use the franchise or did not propose to further request the franchise which was pending in the City Council?

"A. Well, I think it was when I saw it in some of our local papers that they had reached an agreement with the Northern Pacific to use the Northern Pacific bridge and come in on their track on the east side."

And on cross-examination the witness testified:

"Q. What was the occasion for the appointment of this citizens' committee?

"A. The Grays Harbor & Puget Sound Railway Company asked for a franchise from the city to use certain streets and ends of streets in extending a line from above 9th Street, in Hoquiam, northerly, following along the river and waterfront through the town, and the citizens of Hoquiam had been figuring for several years on having to put a bridge across at Simpson Avenue, which is the only practicable point south of our present bridge, and we had some time before made an application to the War Department for a crossing, but it seems that the railway company got in ahead of us. So their petition for a franchise was referred to the committee of the council, the streets, wharves and bridge committee, I believe. I think that the mayor at that time requested the Commercial Club to appoint a committee of business men to meet with the committee from the council to see if it was possible to

(Testimony of P. J. Mourant.)

make arrangements for a joint user bridge to be put in at that time across Simpson Avenue bridge before they would grant the franchise. I think that was the reason the committee was appointed.

"Q. And this committee in the various negotiations and conferences did urge a joint user bridge across the river?

"A. Yes, in the first place, we wanted a joint user bridge.

"Q. The railroad company did not want a joint user bridge?

"A. No, I would not say that. The railroad company never refused to put in a joint user bridge, although some members, I personally, thought probably, from the price they seemed to want to charge the city for the city's share of the bridge, that probably they were trying to discourage it, but they denied that. **[109]**

"Q. They did not refuse outright to join in a joint user bridge, but you got the impression that they were really opposed to it, did you?

"A. Yes, that seemed to be my impression at one time, yes.

"Q. As a matter of fact, you never did agree on a joint user bridge?

"A. We decided in the agreement to build two separate bridges."

The committee was composed of George H. Emerson, W. Adams, H. C. Heermans and myself. Shortly after, Mr. Emerson took a trip to Europe, and Mr. McGlaughlin took his place. Mr. Emerson

(Testimony of P. J. Mourant.)

was chairman of the committee. He was also vice-president of Northwestern Lumber Company. Mr. McGlaughlin was manager of that company. The remark of Holman against the interests of the lumber company being brought into the discussion, was, as I understood it, to the effect that they had or could deal with that company separately, and that he did not want to mix up the Northwestern Lumber Company's negotiations with the city.

On redirect examination, the witness testified:

I did not get the impression that the railroad company was opposed to a joint user bridge from anything they said. They denied that they were opposed to a joint user bridge, that is, they denied that they were trying to block the city from getting a crossing over the river.

On recross-examination:

"Q. In that franchise which they were asking from the city they did not embody the feature of a joint user bridge, did they?

"A. Their franchise, as I understand, was presented before I was a member of the city administration, and it was just asking for a franchise to use portions of certain streets to extend their line through the town.

"Q. The suggestion of a joint user bridge was made by either the city or this committee to which you have referred, acting in the interest of the city?

"A. Yes, sir." **[110]**

The defendants introduced the following testimony by depositions:

[Deposition of J. B. Bridges, for Defendants.]

J. B. BRIDGES: I am a practicing attorney, with offices at Aberdeen, Chehalis County, Washington. In 1908 I was a local attorney in the Grays Harbor country for the Grays Harbor & Puget Sound Railroad Company, a subsidiary of the Oregon and Washington Railroad Company, of which J. D. Farrell was the General Manager and Vice-President and in control of the business.

I was connected to a considerable extent with the negotiations for the purchase of right of way and property at Hoquiam from the Northwestern Lumber Company. In these negotiations Mr. Baldwin participated largely prior to his death, and after that Mr. Holman, who succeeded Mr. Baldwin as chief engineer. Preliminary to this negotiation, Mr. Farrell and Mr. Baldwin were having some trouble in securing an entrance into Hoquiam. They finally settled down to crossing the river south of the Northern Pacific, or at the Simpson Avenue crossing, an extension of Simpson Avenue. The Northwestern Company owned considerable property which would be affected by either one of these crossings. At the early stages of the negotiation between the Lumber Company and railroad officials, I was present off and on, but did not have much to do with the matter, the lumber company submitted propositions in writing, among which was what is known as the Emerson Proposition, dated September 25, 1908. The railroad looked most favorably upon this Emerson Proposition, but was

(Deposition of J. B. Bridges.)

dissatisfied with the price, one hundred and thirty-four thousand dollars. I was asked to see if I could get the price reduced, and was authorized to offer eighty thousand dollars. **[111]** This was *some in* October, 1908. I told Mr. Emerson that I was authorized to offer eighty thousand in lieu of one hundred and thirty-four thousand dollars. Mr. Emerson said that his company was somewhat split up over the offer that had been made, and if it were to be made over again they felt that they would raise the price rather than lower it; that there was no use to make a counter-proposition as to the amount. I told him I did not think the railroad would purchase the property at that price, but that I would report to them the conference. The matter was taken up again in June, 1909, through Mr. Baldwin, and resulted in the document signed June 9, 1909, which is set forth in the complaint and marked Exhibit "D" of the Emerson deposition. About 27th or 28th of June Mr. Baldwin came to Aberdeen "with a view of putting the letter agreement into the form of a contract, if possible." I think Mr. Gordon, right of way agent, was present. Mr. Emerson was there. I do not think Mr. Jones was present. Mr. Emerson and myself were trying to lick the matter into shape of a contract. Mr. Emerson's stenographer was called in, and I, with Mr. Emerson's assistance, dictated the proposed contract, which Mr. Emerson was to have written out and give me a copy which I might send to the officials of the road for approval or disapproval. A

(Deposition of J. B. Bridges.)

day or two later Mr. Emerson sent me a copy of the contract, writing a letter in connection calling my attention to changes in several particulars. I went over the contract with Mr. Isaacs, local engineer, and sent the paper to Mr. Gordon, right of way agent at Seattle. The paper of June 9th contained substantially the entire agreement as far as I had any knowledge. The copy which came from Mr. Emerson to me did contain the bridge clause. That was the first I knew **[112]** of the common user bridge proposition. Mr. Emerson called me by phone just about the time he sent this copy and said Mr. Jones desired further changes in the contract. (Mr. Bridges here offered letter under date of June 30, 1909, from George H. Emerson, which is Exhibit 1 of the deposition of J. B. Bridges, and is as follows:)

"I made some changes in our contract. By reference to Mr. Baldwin's requisition and our answer, I find easement required across our mill-pond was for double-track road, which I think was thirty ft., therefore, have made that correction.

The right of way across our mill-pond should be an easement, as we could not have a fill there and could not afford to place ourselves in position where we would not be able to handle our logs freely. I have, therefore, made that change in the contract.

We have always expected the pier to stand about thirty feet from the line of our mill-pond piles, thus allowing a vessel to lay immediately above or immediately below the pier without encroaching upon

(Deposition of J. B. Bridges.)

the width of the draw span. Such a position of the pier would also best suit the depth of the channel and strength of the current. I have, therefore, stipulated that the Western pier should be as nearly thirty feet from the present line of our boom as practicable.

I think the city has made application for the privilege of erecting a bridge at this extension of Simpson Ave., and it has always been agreed to by Mr. Baldwin that the city could join with them in the construction of a joint user bridge. I have, therefore, introduced that clause in this agreement. I think a joint user bridge would be as desirable to the railroad as to the city. It would afford direct communication to the passenger depot, freight depot, and all parts of Hoquiam lying east of the river and would facilitate traffic from the station.

By reference to the original agreement with Mr. Baldwin, I find the width of the street we propose to dedicate was stipulated at fifty feet instead of sixty. I have, therefore, introduced a paragraph allowing the railroad people to designate the width of the street as to whether it shall be fifty or sixty feet. My judgment is that a sixty-foot street would be a better proposition.

We are anxious to build our mercantile establishment on the southwest corner of Block 51, one of the considerations being this joint user bridge at Simpson Avenue, and the other our warehouses and wharves, which would otherwise have to be abandoned. I wish you would ask your engineer

(Deposition of J. B. Bridges.)

this question—'Can the platform be so depressed that we can truck across to our warehouses?' I do not know where your depot would stand, but I suppose it would be in Block 61. In that case the privilege of trucking across adjacent to the alley, or on the south side of the Lamb property would enable us to build on Block 51. Your engineer can, perhaps, answer that question, and upon the answer depends very largely the point where we must build our store. It is therefore, very important that we should know immediately, as time is short in which to **[113]** build and move.

I have sent a copy of this contract to Mr. Jones, who will return it to you with his comments. Please have it executed by your people and returned to us for execution at as early a date as you can. Each day, while the days are long and the weather is good, is very important to us in doing the large amount of work that is before us." **[114]**

The contract was later re-drawn by the Northwestern people, and was finally drawn and signed by them as set forth in the pleadings. This contract contains two or three important provisions which were not in the contract as dictated by me with Mr. Emerson's assistance. One was the common user bridge clause; the other was the cash payment of twenty thousand dollars, and some other features with reference to the width of certain streets and some matters of no very great importance. Paragraph B as set forth in the draft signed by Mr. Jones under date of July 8th and con-

(Deposition of J. B. Bridges.)

tained in the complaint was not in the original draft dictated by me. That paragraph was put in the contract by the Northwestern people after my dictation of the original draft with Mr. Emerson. Mr. Jones telephoned me at Olympia that Mr. Emerson had sent the proposed contract to the Grays Harbor and Puget Sound Company at Seattle. These contracts, signed by the Northwestern people, were returned to me by Mr. Holman, who had succeeded Mr. Baldwin, Mr. Baldwin having died a few days prior. By reference to a letter, I find it was July 21st that these contracts were returned. On July 23, 1909, I wrote the Northwestern people a letter, which I now produce and which was introduced in evidence, being Defendant's Exhibit 3, as follows: [115]

Defendant's Exhibit 3.

"Answering your letter written by Mr. Emerson and dated July 16th, with reference to contract with the Grays Harbor and Puget Sound Railway Company, I beg to advise that I had a talk with your Mr. Jones on Tuesday of this week concerning the contract, and beg to confirm the same as follows:

In the contract and at the end thereof is the following clause:—

> 'It is also further stipulated by the first party that such bridge may be a joint user bridge with the city of Hoquiam provided the city of Hoquiam contributes its share of cost of construction and maintenance.'

Mr. Farrell, the General Manager of the railroad

company, desires that this clause be stricken from the contract before it is signed by the railroad company. His position is, that we are negotiationg with the city of Hoquiam concerning the bridge rights, and he thinks that the matter of a common user bridge should be one to be left to adjustment altogether by the railroad company and the city. I so expressed myself to your Mr. Jones, but at the *same* he seemed to be of the opinion that the clause should remain in the contract.

We shall continue our negotiations with the city concerning this matter and find out what disposition it has concerning the bridge, and will later advise with you about it; meanwhile, we would like for you to consent to the clause quoted be stricken out, and if you will not so consent, then we ask that the matter may stand as it is until we can come to some definite arrangements with the city concerning the matter." **[116]**

About the same time I went to Hoquiam to confer with the officials of the Lumber Company, trying to get them to relieve the proposed contract of the bridge clause. I had a conference with Mr. Jones (I don't think Mr. Emerson was there), in which I told him the railroad people would not sign the contract with the common user bridge clause in it; that Mr. Farrell refused to approve it in that way, and asked him to cut it out of the contract.

"I explained to him that the railroad company had to go before the City Council in order to get a franchise from the city, and that such a clause in

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the contract, it seemed to me, was unnecessary for the protection of the city; that the city was in a position to protect itself, and that such a clause would hamper us in getting our franchise. He said he must insist on that clause remaining in the contract, and refused to allow it to be stricken out. Again, a few days after that I saw Mr. Jones and had a talk with him about the same matter. Practically the same conversation was had in an attempt to get him to relieve the contract of this clause. I told him at one or both of these conversations that I understood the city was not in a position to pay its just proportion of a common user bridge, and if were agreeable to the city not to have a common user bridge, would he then cut it out. He said he did not understand that the city would take any such position. The matter was fully discussed between us, with the result that the railroad company would not sign it with the clause in there, and Mr. Jones would not permit the clause to be cut out. The contract, meanwhile, had been returned, as I have stated, by Mr. Holman, and was in my safe, which Mr. Jones knew. Inasmuch as the railroad company would not sign with the bridge clause in it, and the lumber company would not agree that it should go out, and it being understood between Mr. Jones and myself that the railroad company would try to make some satisfactory arrangement with the city concerning a bridge at this place, it was agreed between us orally that the matter should stand just as it was for the time being, to see if

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the objectionable clause could not be eliminated by agreement with the city, or to see if we could not come to such an arrangement with the city as Mr. Jones would be willing to eliminate the bridge clause."

The witness' attention being called to his letter of September 15, 1909, set forth in the complaint, he was asked:

"Q. Explain the circumstances under which it was written.

"A. The circumstances are these: As I stated before, the papers signed by the Northwestern Lumber Company had some considerable time before that come to me and were in my safe and I had these conferences with Mr. Jones, **[117]** and on the day that the letter was written, or possibly the day preceding, Mr. Emerson called me up on the phone from Hoquiam, saying that he was sending or going to send a messenger boy to my office for the purpose of getting and for the purpose of the return of these contracts to the Northwestern Lumber Company. I think the same day the messenger came, and as I now recall it, he left a letter from Mr. Emerson to me which letter is as follows:

(Here Defendant's Exhibit 4 was introduced in evidence.)

[Defendant's Exhibit 4.]

"Please deliver to the bearer the deed and any other papers that may be in your hands belonging to the Northwestern Lumber Company and con-

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nected with the right of way transaction, pending between the Northwestern Lumber Company and the G. H. & P. S. Ry." [118]

The witness continued:

"The messenger being there for the papers, and I did not have time, without refusing to give them to him, to confer with the railroad officials at Seattle, I felt, inasmuch as the railroad company had not signed the papers, that I was not justified in refusing to turn them over to the messenger. At the same time, I was not certain that I knew all of the arrangements between the parties, and out of the usual precaution I wrote this letter, saying that I returned the papers, reserving such right as the railroad company might have."

No reply was received to this letter. After that there was considerable negotiation with what was known as the Citizens' Committee.

"As I stated before, the temporary understanding between Mr. Jones and myself was that we were going to try to come to same arrangement with the city. The committee of citizens was appointed, I think by the mayor, to confer with the railroad company in this matter. At the early stages of this bridge matter, Mr. Baldwin and I had gone to the mayor, who was at that time Dr. Frery, and talked with him about the bridge in a general way, and Mr. Baldwin had suggested that if the bridge should be built there that he thought that the railroad company would be willing to put on the bridge sidewalks, and the mayor thought that that would prob-

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ably be satisfactory, and expressing himself that the city was not in a financial condition to build a bridge, and that that would relieve the situation somewhat. Mr. Baldwin and I, on the same day, talked to one or two councilmen, and practically the same kind of talk; but it soon developed that the people of Hoquiam would not be satisfied with sidewalks on a railroad bridge, and this committee was appointed for the purpose of talking the matter over with the railroad company. Several conferences were had in Hoquiam, at most of which I was probably present. Mr. Holman was present at some of them. Mr. Farrell, Vice-President and General Manager, was present at one. * * * The first idea of the committee was that they wanted a double-decked bridge, but that was soon abandoned as being impractical and unsatisfactory, and the next idea was a common user bridge. A bridge with two decks, one for the railroad and one for the general traffic, being side by side. Mr. Holman at one of the meetings presented figures as to what it would cost—what the city's just proportion of the cost of such a bridge would be, and the citizens' committee appeared to be much surprised at the expense, feeling that Mr. Holman's figures were not accurate. * * * It was finally concluded that the city could not stand the expense of its proportion of a common user bridge, and it was suggested by some person that there was room there for two bridges at the Simpson Avenue crossing, and that the railroad company could take one side of the

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street with its own bridge, build it independent, it being a bridge in the nature of a lift-bridge, and when the city got ready it could build one alongside of a similar kind."

I came into the final conference at Seattle, on September 9, 1910, a little late. An agreement **[119]** had been reduced to writing. Mr. Holman showed it to me. That is the agreement already in evidence. Mr. Emerson was appointed chairman of this bridge committee, but before we had gotten very far he went away, to Europe, and Mr. McGlaughlin, manager of the Northwestern Lumber Company, was substituted on the committee, whether as chairman or not I do not know. Between September 15, 1909, and this agreement of September 9, 1910, there were no negotiations between the lumber company and the railroad. "The whole thing was in abeyance, as I have heretofore stated." On September 9, 1910, when the agreement was made with the citizens' committee, I was at Mr. Holman's office at his request. Everybody had left when Mr. Jones came in.

"Q. State in detail what occurred at that time.

"A. There were present Mr. Jones and Mr. Holman and myself. Mr. Holman stated to Mr. Jones that an agreement had been made with the citizens' committee with reference to the bridge at Simpson Avenue crossing, whereby the railroad was to put a bridge on part of the street that would be in the nature of a lift-bridge, and the city, whenever they chose to, should have the remainder of the street.

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Mr. Jones said that he understood that such was the condition. * * * Mr. Holman then stated to Mr. Jones that the railroad company was ready now, this bridge matter having been settled, to close the deal for the purchase of the right of way from the Northwestern Lumber Company, which, he said, he remembered that the consideration was to be $134,000. Mr. Jones answered and said, 'Yes, that was the amount, but,' he said, 'it will cost you more money now; it will cost you $10,000 more, or $144,000.' Mr. Holman said to Mr. Jones, 'I do not know why it should be any more than it was, why you should make it $144,000.' Mr. Jones answered by saying that this price had been put on about a year before, and that now the price was $144,000. At that stage of the conversation I said to Mr. Jones that it did not look reasonable or fair that he should increase the price of it, although the price of $134,000 had been fixed something like a year before, there had been many things standing in the way of consummation, and that his company had been in possession and occupancy of the land all the time, and the railroad company had had no use of it whatsoever. He said that that did not make any difference; that the price now was $144,000. It appeared that my talk to him rather put him out of [120] humor, or at any rate, he left that impression with me—he was somewhat flushed. Mr. Holman then said, 'Now, Mr. Jones, we are ready to take up this deed for $134,000 and pay you for it, but we will not pay you any more.' Mr. Jones says, 'You cannot

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have it for any less than $144,000,' and walked out of the office. That was the end of it. Mr. Jones demanded there at the conversation a payment of ten thousand dollars extra, or $144,000, before the transfer would be made, and Mr. Holman expressly refused to pay it.''

There were no further negotiations. That was the last of the negotiations. I know that the Grays Harbor and Puget Sound Railroad Company conveyed all its property to the Oregon and Washington Company. By reference to the deeds of record, it appears that the Grays Harbor Company conveyed to the Oregon and Washington on June 27, 1910, and on December 23, 1910, the Oregon and Washington conveyed to the Oregon-Washington Railroad & Navigation Company. Subsequently to this conversation, in September, 1910, the Oregon-Washington Railroad & Navigation Company acquired a right of way into Hoquiam over the Northern Pacific tracks. In 1906 the Grays Harbor Company had procured a franchise on a line parallel with the Northern Pacific. That franchise contained certain limitations. Some time after September, 1910, in the spring of 1911, the Oregon-Washington Railroad and Navigation Company entered into a contractural agreement with the Northern Pacific Railroad Company, whereby the former would cross over into the city of Hoquiam over the Northern Pacific, over the Hoquiam River bridge, and using its tracks in the city of Hoquiam, and there was to be a double-track arrangement between the city of Aberdeen and the

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city of Hoquiam. I do not remember the date of commencement of operations. The fact of such an arrangement was made public in Aberdeen and Hoquiam during the spring of 1911, soon after the contract was made; I think in May, 1911, I went before the council and announced the completion of the arrangements made with the Northern Pacific with reference to getting **[121]** into Hoquiam and the use of the bridge of the Northern Pacific, and all these arrangements were made public. I recollect that it was along about May, 1911. As far as my knowledge goes, there was no talk with the Northwestern people after September, 1910, concerning this right of way until August 5, 1911, when Mr. Emerson and Mr. Griffiths, who was representing the lumber company as their attorney in that matter, came to my office and asked me if I was secretary or some official of the Grays Harbor and Puget Sound Railroad Company, and I told them that I was secretary formerly, and they then made demand with reference to the taking over of this property and at that time rendered a deed. This was some three months after the announcement had been made of the arrangement with the Northern Pacific. They had and presented deeds executed by the Northwestern Lumber Company; two or three different deeds; one was a quitclaim deed and one a warranty. It was a formal tender of performance on their part. They demanded $134,000. Mr. Griffiths, in the presence of Mr. Emerson, stated that they now made demand that the railroad com-

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pany now take up the deed on payment of $134,000, and they waived any interest claim, and waived anything that might have been in the contract with reference to the bridge clause, and said they made their demand upon the purported contract which had been executed by the Northwestern Lumber Company and which the railroad company refused to execute, and the original offer in the Emerson proposition and the acceptance thereof by Mr. Baldwin. I refused the tender. This suit was brought soon afterwards.

Shortly after this talk in Mr. Holman's office, on September 9, 1910, the Northwestern commenced to make some improvements **[122]** which they had in contemplation. They commenced after that conference; I would not wish to state just when. According to my recollection, they had not made any improvements before that.

On cross-examination the witness testified:

I was one of the trustees from some time prior to September, 1908, until after these negotiations. I am inclined to think I was Vice-President, but would not want to be sure about that. I was Secretary. I think I was one of the trustees all the time. I think Mr. West and Mr. Patterson were the other two. Mr. Baldwin was chief engineer until the time he died. He was succeeded by Mr. Holman. Mr. Farrell was never directly an officer of the company. The interest of the Washington and Oregon was by virtue of the ownership of its stock. Mr. Farrell was no officer, although he had control of

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the officers of the Grays Harbor and Puget Sound Railroad Company. I did very little toward the purchase of property. I was attorney and did not act in any capacity other than attorney except when there were some papers to sign, or something of that character. Mr. Farrell had ultimate charge. The first personal, absolute knowledge I had of Mr. Farrell's connection was when he refused to accept the proposed contract with the bridge clause in it. I anticipate he knew all about it before that date. He made objection to that clause. I would not want to say that the balance of the contract was agreeable to him, although I don't know that it was not agreeable to him. He made no objection to me except the bridge clause. The only changes I recollect now in the contract signed by the Northwestern Lumber Company was that all of paragraph 8 was **[123]** added, and a provision for the payment of twenty thousand dollars down. That is all I recollect now. Relating to the payment of the money, there was no objection; whether it was agreeable or not, I do not know. The bridge clause was the only paragraph I ever objected to. The twenty thousand dollar payment was never discussed in my presence. That was not in the contract originally and was not in the contract when I drew it. I do not know that it had ever been talked of after that as to whether it was satisfactory or not. As far as I know, the bridge clause was the only objection to the agreement.

Mr. Holman at this point stated that Mr. Baldwin

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died on June 16, 1908. By consent this became part of the testimony.

I think the description came from the right of way office of the railroad company; I cannot say positively. I am satisfied that the description was correct and was so acceded to by both parties. They were difficult descriptions and we did the best we could to make them right. The draft signed by the lumber company is very much the same as the one dictated by me in the presence of Mr. Emerson, with the exception of the bridge clause and the twenty thousand dollar cash payment, and some minor details, which I think would cut no figure. The twenty thousand dollar payment was not objected to. That is all I can say about that. I do not recollect being present at the conference on June 9, 1909, when the proposition of September 25th was talked over—I think I was not present at the conference but was present when the acceptance letter was written. I do not know what was said at that conference, if such conference was held. Prior to [124] the writing of this letter from Mr. Emerson of June 30, 1909, which is Exhibit "III" to my testimony, I had never heard any discussion with the officials of the Northwestern Lumber Company about a bridge across the river being so constructed as to accommodate the public travel as well as the Railroad Company, but there had been some little talk with some of the city officials, which I think was before that. Prior to that time I had filed application for a franchise with the city. In connection

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with that there was some discussion with the city about a bridge. I think there were three drafts of the formal agreement; the first was the one I dictated. The next was the one that Mr. Emerson got out and sent to me with his letter of June 30, 1909, being the one I had dictated, with certain modifications and changes. The second one, I feel very certain, made no provision for the payment of anything down. Then from conversations I think there must have been the third draft. The bridge clause was put in the second one. It was put in by Mr. Emerson—the letter transmitting it indicates that. I think there was nothing about the time of payment in the second draft. My recollection is refreshed by a letter from Mr. Jones mentioning the twenty thousand dollars, which was the first I had known of the twenty thousand dollar matter. The first draft was prepared near the very last of June, as I refreshed my memory from letters. To the best of my recollection there were only three drafts of the agreement. No contract was drawn, or attempted to be drawn, until after Mr. Baldwin's death, or before the latter part of June, when I drew the contract in Mr. Emerson's office. With the exception of paragraphs 8 and 9, the contract as signed by the Lumber Company is substantially as I dictated it, except the twenty thousand dollars clause. My impression is that there was the first draft, which I dictated; then the one which Mr. Emerson sent [125] me, containing the bridge clause; and later the one which was signed, which contains, in addition to the bridge

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clause, the twenty thousand dollar cash provision.

"Q. And it was agreed between you and Mr. Jones that that controversy as to whether that bridge clause should remain in the agreement or not, was left in abeyance to see what the City Council and Mr. Holman would do?

"A. Well, in a general way. There was no time fixed or anything of that character, and it was just simply an understanding between us that maybe the Railroad Company and the city would get together in such a way that Mr. Jones would think it unnecessary to have the bridge clause in the contract, and it was so left as it was.

"Q. In other words, that controversy as to whether the bridge clause should be in or out was left in abeyance for the time being?

"A. Yes, sir, in that way.

"Q. In other words, it might not become important at all?

"A. Yes, sir. It might not become important.

"Q. And is not that why in your letter of September 15th, in which you transmitted these agreements to Emerson, you stated the understanding between you was that it should not affect the agreement of the parties?

"A. No. The reason I put that in there was the one I gave before,—that here was a large deal; the papers were in my possession; Mr. Emerson had sent a messenger for the papers, and that I felt, so far as my knowledge went, that I had no right to withhold the papers longer, but at the same time I had

some hesitancy about surrendering the papers because I was not certain that I knew all of the arrangements between the parties. But I felt certain enough about it to surrender the papers, and it was for that reason that I put that clause in there. I remember very distinctly the reason.

"Q. You say in that letter: 'By returning to you it is not the intention of the Railroad Company to waive any rights which it has with reference to the agreement to purchase this property, and I anticipate it is not your intention that the handing of these papers to you should have that effect.' Now, was not that statement made by you in writing in pursuance of the understanding with Mr. Jones?

"A. Yes, the latter part of it. I think so.

"Q. The letter was intended to be a stipulation between you that the return of the papers should not affect the status of the deal either way? [126]

"A. No. Up to that time the parties had failed to get together on a contract. They had entered into a tentative agreement or arrangement by means of the letter written by Mr. Baldwin, but when it came to getting into the details there were a great many of them, a great many changes; a great many things were put into the written agreement which were not at all mentioned in the letter, and the parties were unable to get together. And I did not consider—I never considered that there was any writing whereby they were bound by any such terms as these.

"Q. I understand you to say that the only point upon which they did not get together and which was

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not satisfactory so far as you knew, was this clause about the bridge? A. Yes, sir.

"Q. So that you had reached an agreement on everything else, hadn't you?

"A. So far as I know, we had.

"Q. Now, is it not a fact, Mr. Bridges, that at the time you wrote this letter of September 15, 1909, returning this draft of an agreement, everything had been agreed upon except the bridge clause?

"A. As far as I know, it had been.

"Q. And is it not a fact that by agreement between you and Mr. Jones, that bridge clause was to remain in abeyance until the city of Hoquiam had considered the question in the course of your negotiations with the city?

"A. This agreement or understanding—I do not know whether it would reach the dignity of an agreement—but that was the understanding between Jones and myself.

"Q. And whether or not there was an original understanding between Baldwin and Emerson and Jones about this bridge, you do not know?

"A. No, I do not know of any."

In connection with the conversation in Mr. Holman's office in September, 1910, "did not, in that connection, Mr. Jones say that he was entitled to interest?"

"A. He did not demand interest. He demanded ten thousand dollars, he said.

"Q. Did not he say he was entitled to interest?

"A. No, he said the amount now necessary was

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$144,000, or ten thousand dollars more than the original amount.

"Q. Are you certain, Mr. Bridges, that he stated the exact amount? [127] A. Yes, sir.

"Q. Did not he say that was interest?

"A. I am inclined to think that he said in answer to Mr. Holman's question as to what that ten thousand dollars was for, that it was interest.

"Q. Interest on the amount of the contract?

"A. He may have said that. I would not be positive about that. * * * I am inclined to think he said that was interest."

Mr. Holman said that he would not pay anything more than $134,000.

"Q. Now, is it not your recollection that the substance of what Mr. Jones requested or demanded was interest?

"A. I think Mr. Jones said interest, in answer to Mr. Holman's question as to what the ten thousand dollars was for; that the contract or the price had been fixed nearly a year before and that he thought they were entitled to—I would not be willing to say one way or the other whether the ten thousand dollars was interest. He said expressly he would demand ten thousand dollars more and take $144,000 to close the deal; but I cannot say positively one way or the other as to whether he said it was interest."

Mr. Griffiths said, when he tendered the deeds, that he would waive any claim above $134,000. I understood Mr. Griffiths and Emerson were there to formally tender the deeds; that that was their purpose

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in coming there and not their idea or hope of settlement. A little before July 7th, 1909, I caused a proposed franchise to be introduced at Hoquiam, with a view to crossing the river at Simpson Avenue. There was practically nothing done but the introduction of the franchise. It never came up again, because it was understood between the counsel and myself that the question of the bridge would have to be discussed and some arrangements come to about that, and the counsel has never to this day had the franchise up again that I know of. The agreement provides that the Railroad Company and committee should co-operate to put the franchise through. **[128]** This matter with Mr. Jones came up very shortly, or on the same day, and of course after that the Railroad Company, so far as I know, took no steps whatever to cross at the Simpson Avenue Crossing, either with the city or otherwise. I did not notify the Railroad Company that it was not the intention to sign a contract for the purchase of this property.

Referring to the September 9th conference:

"Q. Holman did not notify them, then, that there was no intention to carry out the contract?

"A. Holman said he would not pay anything more than $134,000.

"Q. But he did not say he would not carry out the contract?

"A. Not in these words. * * * The talk there was, Holman, representing the Railroad Company, was willing *to $134,000* for their deeds. They were

not willing to deliver the deeds for that price."

It was agreed upon the record that the deeds from the Grays Harbor and Puget Sound Railroad Company to the Oregon and Washington Railroad Company and the deeds from the Oregon and Washington Railroad Company to the Oregon-Washington Railroad & Navigation Company might be introduced by copy. The material part of these deeds is as follows:

Complainant's Exhibit "A"—the record of a deed from the Grays Harbor & Puget Sound Railway Company to Oregon and Washington Railroad Company, under date of June 27, 1910, which deed, after specific description of property conveyed, contains the following:

"Also all and singular the right of way and other rights of every kind and character heretofore acquired or hereafter to be acquired in any manner whatsoever by the said Washington corporation in aid of any connection with the aforesaid railroad route, and any and all other railroad routes or rights of way of the Washington corporation in the State of Washington now or hereafter surveyed or located or hereafter to be acquired * * * . Subject, however, to any and all existing liens, and charges upon the said [129] premises hereby conveyed, or any part thereof, all of which the Oregon corporation (the grantee) hereby assumes and agrees to pay."

Complainant's Exhibit "C"—the record of a deed from the Oregon and Washington Railway Company

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to the Oregon-Washington Railroad & Navigation Company, dated December 23, 1910. Part of the description is as follows:

"All the railroad and telegraph lines of the vendor, together with all the rights, powers, immunities, privileges, franchises and all other property appertaining thereto, subject to the rights of the Chicago, Milwaukee & Puget Sound Railway Company relating to joint ownership * * * . All appropriation of real estate and other property made by the vendor, and all suits, actions or rights of action instituted by the vendor for the condemnation of property for use in connection with any railroad of the vendor, or any branch or extension thereof. To have and to hold the above railroad, telegraph lines, franchises, rights, contracts and other property unto the vendee (Oregon-Washington Railroad & Navigation Company) and its successors and assigns. The vendee hereby assumes and agrees to keep and perform each and every of the contracts hereby assigned and transferred or intended to be assigned and transferred by the vendor to the vendee, and the vendor agrees to pay and discharge all the debts and liabilities so that the property hereby conveyed shall be free from all debts and liabilities of the vendor." **[130]**

I received the abstracts. I found nothing serious the matter with the abstracts. While there were some little technical matters, there would have been no difficulty. There was no objection to the title. My understanding is that the Oregon and Washing-

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ton Company financed the Grays Harbor and Puget Sound Railroad Company; that all the money was furnished by the Oregon and Washington and came from J. D. Farrell, who is Vice-president. All I know about the twenty thousand dollar payment on signing the contract was that it was inserted by the Lumber Company. It was never taken up by me with any of the officers of the Railroad Company, or by Mr. Farrell or Mr. Baldwin or Mr. Holman, or any of them. The word "stipulated" as contained in the 8th paragraph was not used by me in any part of the draft which I dictated. I do not think I ever used the phrase, "That it is stipulated." At the time I agreed with Mr. Jones that the matter should stand in abeyance until we could see what arrangement could be worked out with the city, the Railroad Company had absolutely refused to agree to the bridge clause. It had refused to sign the agreement with the bridge clause in it. Mr. Jones refused to withdraw that clause. It was agreed that the matter should stand to determine whether the Lumber Company would waive that clause or not. "That is my understanding; that inasmuch as Mr. Jones, representing the Lumber Company, would not withdraw the clause, that possibly negotiations with the city would be of such a nature as would persuade him to withdraw the clause." I never had any reply to my letter of September 15, 1909, either written or oral. The officers and trustees of the Puget Sound Company never acted upon this contract. Their action with regard to this property was perfunctory. They **[131]** had nothing to do with the

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actual business of the company. There was no person had any authority to act except under Mr. Farrell, none of the officers of the company. Their duties were perfunctory.

On re-examination the witness testified that Mr. Farrell was Vice-president of the Oregon-Washington Railroad & Navigation Company and had entire charge of the transaction. He knew about this contract as early as July, 1909.

[Testimony of J. R. Holman, for Defendant.]

The defendant introduced the testimony of J. R. HOLMAN, taken by stipulation before a special examiner.

I am Assistant General Manager and Chief Engineer of the Oregon-Washington Railroad & Navigation Company. I became engineer of the Grays Harbor & Puget Sound Railroad Company July 1, 1909, by appointment of Mr. Farrell, who was Vice-president and General Manager, succeeding H. F. Baldwin, who died June 16, 1909. Some time in July, 1909, the Grays Harbor & Puget Sound Railroad Company conveyed its property to the Oregon and Washington Railroad Company, which subsequently, in December, 1910, conveyed to the Oregon-Washington Railroad & Navigation Company. Since the dates of their respective conveyances, neither the Grays Harbor and Puget Sound nor the Oregon and Washington have engaged in any business whatsoever. My first connection with the Northwestern Lumber Company negotiation was about July 6, 1909. At the request of Mr. Gordon,

(Testimony of J. R. Holman.)

right of way agent, I went to Hoquiam July 6th with Mr. Gordan to confer with the Northwestern Lumber Company officers relating to the details of an agreement which it was proposed to formulate with these people relative to right of way. I knew nothing [132] whatever of the previous negotiations. When I took hold of the business on July 1st I found matters in a chaotic state, and had had no opportunity to advise myself relating to this transaction. At Hoquiam I had an interview with Mr. Jones—Mr. Gordon was present—in the office of the Northwestern Lumber Company in Hoquiam.

"Q. Tell what took place at that interview.

"A. The question I was called upon to decide or adjust had reference to the crossing of our tracks on 9th Street, I believe it was. That had previously been agreed to as one of the streets which was to be vacated. The Northwestern Lumber Company had subsequently decided that that crossing would have to be left open, and they wanted some adequate provision in the contract that left the street open. We went to view the premises on the ground. Mr. Jones pointed out how it was necessary and important to them that the street be left in order to enable them to reach their warehouse, and after considerable discussion of the subject we formulated an agreement in reference to leaving the street open, and how it was to be vacated and left under the control of the Railroad Company although for public use."

I think at that time there was a carbon copy of a

(Testimony of J. R. Holman.)

draft, which I do not remember of reading or having in my possession. I do not know whether this draft contained the bridge clause, as I do not remember having read it. I am positive the bridge clause was not mentioned.

"Q. Why are you so positive on that point?

"A. In the first place, if it had been, I would have investigated the facts in regard to it, because I fully appreciate the impossibility of such a clause; and from the second fact that in returning the executed agreement to Mr. Bridges some two weeks later I called his attention to the fact that this bridge clause had not been discussed at our conference with Mr. Jones."

When I received the agreement signed by the Lumber Company dated July 7th, 1909, and went over it in detail I found this bridge clause in there. I had never before that assented to this bridge clause, and had had no conversation with any representative of the Lumber Company in which it was mentioned. My next conference **[133]** with Mr. Emerson, September 3, 1909, in Seattle. This was a conference with the so-called Hoquiam committee, appointed by the city council and Chamber of Commerce of Hoquiam, of which Mr. Emerson was chairman. The meeting was in my office. The mayor, city engineer and several other gentlemen were present. After the meeting Mr. Emerson remained and we discussed the matter of the bridge. I pointed out to Mr. Emerson the fact that we were anxious to avoid the common-user bridge for va-

rious reasons, the most important of which was we were afraid that the city could not finance its proportion of the bridge and would therefore delay us in getting into the city. Mr. Emerson assured me that that would not stand in the way; that the Northwestern Lumber Company itself would see to the financing of the bridge on the part of the city. On September 20th, 1909, Mr. Emerson came into my office in Seattle and we further discussed the bridge question as to what progress was being made, and, incidentally, the agreement. I told him this bridge clause was standing in the way of the execution of the agreement, and I suggested that the best way to overcome that difficulty was to continue the negotiations with the city and see if we could work out some plan in regard to the bridge which would avoid the necessity of any such clause in the agreement. He told me that he was going to leave for a trip to Egypt and that the matter could remain in abeyance. At this conference I told Mr. Emerson that the bridge clause was the objection to the contract. I believe from the conversation he fully understood that that was the objection to the contract. I cannot recollect the specific words. On December 30, 1909, I had a talk with Mr. Jones in my office. He wanted to know what was the matter with the **[134]** Northwestern agreement—what was holding it up. I told Mr. Jones that Mr. Farrell had refused to sign the agreement on account of the insertion by him of the common user bridge clause. We thought that worked an injustice on us in dealing

(Testimony of J. R. Holman.)

with the city for our franchise, and while we were perfectly willing to negotiate with the city and deal with the city, we did not want to be hampered by an obligation of this kind in a real estate transfer, and that Mr. Farrell was immovable in his attitude and would not sign with that provision in it, but if it were eliminated, the agreement could be signed and we could consummate our trade with the Northwestern Company. Mr. Jones replied that if that was our stand in the matter, he supposed we might as well consider the deal off.

My next conference with members of the Northwestern Company was on September 9, 1910, with Mr. Jones. Mr. Bridges, our attorney, was present, at my office in the Central Building in Seattle. This conference was after the agreement with the city committee had been reduced to writing and signed. Mr. Jones came over on request by telephone. "I remarked that we had now reached an agreement with the bridge committee with reference to the bridge. Mr. Jones said, 'Yes, so I understand.' I stated in a general way the terms of that agreement and concluded by saying, we are now ready to close up our trade with you. Mr. Jones said, 'Yes.' I said, this can be done now merely by your making a satisfactory deed, and that we will make the payment. Mr. Jones said. 'Yes.' I said, that we will make the payment, which I understand is $134,000, according to the tentative agreement. Mr. Jones says, 'Yes, but now the property will cost you more money; it will cost you $144,000.' I says, 'What is

(Testimony of J. R. Holman.)

the extra ten thousand dollars for?' Mr. Jones says, 'Well, we considered this trade closed over a year ago and there is a matter of interest,' Mr. Bridges broke into the conversation at that point and said to Mr. Jones; 'I don't see how you can take that stand. You have been in possession of the property all the time, and it has been understood and agreed between us that this matter was held up awaiting negotiations with the city.' Mr. Jones broke into Mr. Bridges' talk and said: 'That makes no difference. **[135]** That property will now cost you $144,000.' I says, 'Mr. Jones, we will never consider that for a minute; we will not pay that price.' Mr. Jones said, 'You will either pay that price or not get the property.' I says, 'Well, we will not take the property at that price. I will not agree to it.' Mr. Jones remarked, 'Well, either you or somebody else will pay that price before you get the property.' He appeared during the latter part of the conversation very much irritated. He was flushed in the face and went out of the office after saying these last words, or rather, slammed the door after him as he went out.'' That was the end of the conference. After that I never had any consultation or negotiation with any representative of the Northwestern Lumber Company. No representative of the company ever sought any further conference or further negotiation relative to this deal prior to the time in August when there was a tender of deeds and demand for payment of the money. At the time of the conference in September, 1910, the railroad was

(Testimony of J. R. Holman.)

owned by the Oregon-Washington Railroad & Navigation Company. This property was intended to be used for right of way purposes and would be of no value for any other purpose.

"Q. After this final conference in September, 1910, what, if anything, was done by the Railroad Company to acquire right of way or railroad tracks, or rights into the city of Hoquiam?

"A. Well, immediately following the break with Mr. Jones, September 9th, I began work on alternative plans for entering Hoquiam, abandoning in my mind the main plans—the use of the Northwestern Lumber Company's property, at least the amount covered by this agreement. We worked on various plans and at various times until in May, 1911, we reached an agreement with the Northern Pacific Railway for the use of their right of way into Hoquiam, their bridge across the Hoquiam River, the use of their station grounds in Hoquiam, incident to a joint agreement by which we both used certain rights of way in Aberdeen and Cosmopolis devoted to joint use."

That agreement with the Northern Pacific gave us terminal facilities, both freight and passenger, in Hoquiam. The agreement with the Northern Pacific runs nine hundred and ninety-nine years. We began operation into Hoquiam over the Northern Pacific right of way in September, 1911. Our plans to operate were made known in May, 1911, but delay was caused [136] by the construction of a bridge across the Hoquiam River. The agreement with the

(Testimony of J. R. Holman.)

Northern Pacific was entered into in May, 1911. Our company could now make no use of the property covered by the negotiations with the Northwestern Lumber Company. Immediately after our contract with the Northern Pacific, public announcement was made in the newspapers.

On cross-examination the witness testified:

After the death of Mr. Baldwin, June 16, 1909, until July 1st, the office of chief engineer was vacant. This Hoquiam situation was taken up by me July 6th. From July 1st to the 6th other urgent matters occupied my attention. There was not a word said about the bridge during my talks with Mr. Jones July 6th or 7th. The main point I went down to consider related to the vacation of 9th Street. Indirectly I understood from Mr. Gordon that Mr. Jones had suggested certain changes in reference to the contract agreement, and as far as I know these changes related to street crossings, which we had no difficulty in adjusting to the satisfaction of both parties. It was a mere detail. When the contract came to me from the Northwestern Lumber Company with the bridge clause in it, I carefully reviewed the contract and discovered this bridge clause and realized the handicap that it put upon us in negotiating with the city for franchise crossings there.

"Q. Now, in what way did that operate as a handicap, in your opinion?

"A. As I looked at it, this agreement made it obligatory on us to enter into an agreement with the

(Testimony of J. R. Holman.)

city for a bridge. There was a wide difference of opinion with the city as to the character of the bridge, the kind of type and class of structure, and it left us with no recourse whatever to have our views obtain. We had to accept the decree of the city if we bought the right of way subject to that condition; if we had agreed to it." **[137]**

That was my view of this contract and the reason why I objected to it. I also objected to a common user bridge. There were two objections; one that it handicapped us in our negotiations with the city even if we agreed to the common user bridge; second, I objected strongly to the common user bridge.

"Q. In other words, you thought that you could deal with the city a little more liberally if the consent of the Northwestern Lumber Company was given that the common user clause be left out of the contract?

"A. Yes, I thought perhaps we could prevail upon the city to recede from their demands for a common user bridge. Personally, I did not know that Mr. Baldwin had promised about this common user bridge."

I do not know what Mr. Baldwin did in his lifetime. When I had my conversation with Emerson I understood that there was a franchise pending at Hoquiam for franchises and other matters relating to the Railroad Company's rights of way. I talked to Mr. Emerson as a member of the city committee. I had an idea that we could get the city to recede from its demand for a highway bridge. I got that

(Testimony of J. R. Holman.)

idea from conversations I had with members of the city council. I was urging the city council to recede from its demand for a highway bridge at that place. I did that at our meeting on September 3d. I showed them on the map that the citizens had an alternative crossing where they could get another bridge. They were favorably impressed with it and were considering it. Mr. Emerson broke in and said the Northwestern Lumber Company would law them forever before they would let them go through on that crossing. At my talk with Mr. Emerson on the 20th of September, 1909, I agreed with him that this matter (of a formal contract on account of the bridge controversy) might remain [138] in abeyance. At that time we were negotiating with the city with respect to the bridge.

"Q. You were relying upon securing this property from the Northwestern Lumber Company?

"A. Yes.

"Q. And the reason agreed upon between you and Mr. Emerson for letting the form of contract remain in abeyance was that you might reach an agreement with the city that might be satisfactory all around?

"A. Yes, sir."

The delay in pushing matters was on account of the city council. The agreement reached with the citizens' committee in September, 1910, was predicated upon a joint survey which was to be made, and a map prepared showing the definite location of the two bridges, and then we were to make joint application to the War Department if these franchises

(Testimony of J. R. Holman.)

were granted. The agreement with the citizens' committee contemplated that we were to co-operate, provided we got a permit from the War Department to construct two bridges and we got our franchise from Hoquiam. It was our intention to proceed with building the railroad according to the plan. Notice of intention to abandon this plan was given to the city of Hoquiam in May—not before May. In my mind I definitely abandoned the plans of acquiring the entrance to Hoquiam by acquiring the land from the Northwestern Lumber Company. I told Mr. Farrell and Mr. Bridges that day, that is, September 9, 1910, that I considered that trade was closed. Mr. Jones' attitude was immovable. We could never get together on it, and we began to prepare other plans that day.

I did not conceive the idea of going in over the Northern Pacific. Mr. Farrell had control of this whole matter,—was Vice-president and General Manager of the Oregon-Washington [139] Railroad & Navigation Company. Mr. Farrell is the man who exercised control of property matters in the State of Washington at all times during this negotiation. After September 9, 1910, when that conference with Mr. Jones occurred, we spent a short time surveying the approach at Simpson Avenue. I don't remember whether any bridge plans were prepared. There might have been some alignment plans, but the surveys were conducted by my assistant engineer Isaacs. I don't remember that plans were filed with the city council. The bridge plans

(Testimony of J. R. Holman.)

were filed with the city council after September 9th. Whatever Isaacs did was done under my authority. Prior to this conference of September 9th I had given instructions for a survey following out the conditions. I cannot say what Mr. Isaacs did pursuing previous instructions, that is, instructions previous to September 9th. I do not remember calling him off the work, because I don't recollect that he was on the work.

"Q. Your statement now is, absolutely nothing was done after September 9th with reference to carrying out the terminal plans at Hoquiam as contemplated before that date?

"A. Answering that question literally, I will say nothing was done contemplating carrying out the terminal plan arranged before that date."

And on re-examination the witness testified:

My attitude was always against a common user bridge. Mr. Emerson was strongly insistent upon a common user bridge. On this question Mr. Emerson took the city's side. When Mr. Emerson left to go abroad, Mr. McGlaughlin, manager of the Northwestern Lumber Company, took his place. Mr. McGlaughlin strongly contended for a common user bridge, and took the part of the city in all questions of difference between us [140] with reference to the location, division of expense, etc. At a conference some time in the spring of 1910, at which Mr. Farrell was present, Mr. Farrell openly complained that the Northwestern Lumber Company were actively opposing the railroad in these nego-

(Testimony of J. R. Holman.)

tiations with respect to the bridge. Mr. McGlaughlin was present at that conference. Mr. McGlaughlin stated that he was there as representative of the Northwestern Lumber Company. After my conference with Mr. Jones on September 9, 1910, I was trying to work out some plan to get across the Hoquiam River irrespective and aside from the previous negotiations with the Northwestern Lumber Company. One plan contemplated using the Simpson Avenue crossing which we had originally contemplated, curving well off an approach to the bridge so as to get on to Levee Street and avoid the Northwestern Lumber Company's property. There might have been some surveys made using the original alignment in order to fix the exact location of this alternative line. Then we went further up the river to another crossing which had been considered. I had in contemplation condemning some of the property of the Northwestern Lumber Company. Prior to September 9th various work had been done in the way of getting up plans and details and estimates, consulting engineers, and discussing various plans with the city. Before I became engineer I learned that the plan for a city bridge at Simpson Avenue had been of long standing.

Thereupon the defendant rested. [141]

The license of the Northwestern Lumber Company to do business under the laws of the State of Washington as a foreign corporation was admitted.

[Deposition of C. H. Jones, for Plaintiff (Recalled).]

C. H. JONES, on being recalled, in reply, further testified by deposition:

"Q. On the occasion of meeting Mr. Holman in the city of Seattle in September, 1910, after the so-called bridge agreement had been made, did you in substance or at all state that if the railroad company wished the property it would have to pay $10,000 more than the amount provided for in the contract?

"A. No, sir; I did not.

"Q. Did you in substance, or at all, demand any sum or amount more than that named in the contract? A. No, sir.

"Q. Did you at any time or on any occasion ever request a payment of more money than what interest might be due?

"A. No, sir. On the contrary, I positively stated that there was no change in the price, but I thought we ought to be entitled to interest.

"Q. Did Mr. Holman notify you at that time, or at any time, that the contract for the purchase of this land in this suit was terminated for that reason?

"A. No, sir.

"Q. Was there ever any controversy between you or any officials of the company, excepting upon the subject of whether or not there should be interest paid?

"A. Nothing, only the question as to whether there should be interest paid or not.

"Q. Did you or your company, so far as you know, have any knowledge prior to May, 1911, that the rail-

(Deposition of C. H. Jones.)

road company, the defendant, did not intend to carry out this contract?

"A. Nothing. We always supposed they would carry it out and expected us to do so.

"Q. Was your first knowledge on that subject when you saw the account in the Hoquiam papers about May, 1911? A. About that time.

"Q. What steps did you take after that to protect what you considered the rights of the plaintiff company? [142]

"A. I put the matter in the hands of Mr. Austin Griffiths, as attorney, to bring it before the railroad company."

And on cross-examination:

"Q. And you have nothing now that you can add to your original direct testimony as to what occurred in that interview '(Referring to the interview in Holman's office in September, 1910.)

"A. Nothing; only that I don't know why I didn't remember that Mr. Bridges was present."

I now recall that Mr. Bridges was present. I understood that the conference was for the purpose of closing up our negotiations. If they were ready, we were.

"Q. It (referring to the negotiations) was not closed *at interview,* was it? A. No.

"Q. Why?

"A. Because the question of interest came up in regard to the amount which should be paid, and Mr. Holman did not have any desire or any authority to consent to that, and therefore the interview was

(Deposition of C. H. Jones.)

carried on in that kind of a way until there did not seem to be anything coming from it. I told them they should take it up with their principals and see if they didn't think that we should have some interest.

"Q. You were willing to close the matter at that time unless they should concede you an additional sum by way of interest, or for some other reason?

"A. I don't know that I was unwilling to, but I thought we ought to have interest and that they ought to give that consideration.

"Q. Didn't you state in your former testimony that you demanded interest and refused to settle the matter unless it was conceded?

"A. I don't think that I demanded it, only that I thought we ought to be entitled to interest, and wanted them to consider it that way. * * * I just called their attention to the interest matter, and that we ought to be entitled to interest; the matter had been delayed so long time.

"Q. Didn't Mr. Holman, in that interview, in the presence of yourself and Mr. Bridges, state that his company would not pay anything in addition to the amount named in the previous negotiations? [143]

"A. He stated that he didn't think the company would pay anything more than $134,000."

I didn't think that at any time we changed the price. As far as the interest was concerned, they were to consider it. I didn't understand that we would not trade any other way, but wanted them to consider the interest matter.

(Deposition of C. H. Jones.)

"Q. You never sought another conference, did you?

"A. No, I did not, until I made demand on them and presented the deeds to them through our attorneys."

That was after the deal with the Northern Pacific was announced. I made to them the proposition then, I think, that if they were willing to complete the deal, we would cancel the interest or any other demand. I don't know just what it was. The deeds tendered named a consideration of $134,000. These deeds were prepared by our company and signed by me, before we called on the railway officials.

"Q. Mr. Jones, referring again to this interview in September, 1910, is it not a fact that when you left the room you remarked in substance, that they would either have to pay the amount you were claiming or that they would not get the property?

"A. No, sir, I did not."

[Testimony of Mr. Holman, in Surrebuttal.]

Mr. HOLMAN, being called in surrebuttal, testified:

"Q. You have heretofore stated in your previous testimony, in substance, that with the termination of the interview with Mr. Jones in your office in the presence of yourself and Mr. Bridges, you considered the negotiations between the complainant and the railroad company as terminated and abandoned. Referring now to the correspondence which has been introduced by the complainant between yourself or your office and the officials of the city of Hoquiam

(Testimony of J. R. Holman.)

during September and October, 1910, please explain what that correspondence had reference to.

"A. When I considered the trade with the Northwestern Lumber Company abandoned and given up, I immediately began the preparation of plans for an alternative location of our line; an alternative location of depot and team tracks, but holding practically almost the identical location for a bridge, but avoiding this property that we had previously contemplated acquiring from the Northwestern Lumber Company, so that I therefore continued [144] my negotiations with the city for this bridge, for which we had a War Department permit bill on that location.

"Q. At what point were you contemplating locating station grounds under these alternative plans you had under consideration?

"A. On Block 38, between 6th and 7th streets, and between Levee Street and 'I' Street, in the city of Hoquiam.

"Q. What plans were under consideration for the acquisition of a right of way to reach that property?

"A. I had Mr. Bridges immediately begin the compilation of values on the property. I had my office begin preparing descriptions, so that we could file condemnation immediately if negotiations should not be carried out. We wanted to acquire the property quietly if we could, without making any public announcement of it.

"Q. Did that contemplate acquiring any of the property embraced within the previous negotiations

(Testimony of J. R. Holman.)

with the complainant?

"A. The intention was to avoid entirely the property previously covered by the Northwestern Lumber Company's negotiations, although it was realized that we might have to acquire a very narrow strip fronting along Levee Street, which would be a very small fraction of that previously required."

On cross-examination the witness testified:

"Q. Did you notify the Northwestern Lumber Company of this intention of yours to change your terminal location? A. No, sir.

"Q. Did you notify them that you would not require their property?

"A. I did. I didn't notify them that we would not require it, but that we would not pay the price asked by Mr. Jones.

"Q. Did you notify them that you would not pay $134,000?

"A. I notified them that we would pay $134,000."

On re-examination:

"Q. At what time did you notify them you would pay $134,000?

"A. At the interview in my office in September, 1910, I told them we were willing to take the property and would pay $134,000 for it. At his demanding an increased price of $144,000, I told him we would not pay it.

"Q. After that interview or conference did you ever have [145] another further conference or interview with any of the officials of the complainant with reference to acquiring the property em-

braced in the original negotiations? A. No, sir.

"Q. Or any part of it? A. No, sir." [146]

On reply the following letters were introduced by the complainant as exhibits:

"Complainant's Exhibit A–F.

Seattle, September 23d, 1910.

Mr. J. D. Moughmer,
City Engineer,
Hoquiam, Washington.

Dear Sir:—

Our recent surveys indicate that there is ample room in Simpson Avenue for the two bridges upon our revised alignment. I am handing you herewith a print of our drawing No. 262–H, which shows this.

While the sidewalk on the bridge is apparently very close to the burner, you will probably recall that this extreme diameter of the burner comes below the wharf level.

We are proceeding on the preparation of the map and plans for accompanying application to the War Department, and when we have it sufficiently advanced to be passed upon will ask you to kindly come up and go over it with our Bridge Engineer.

Yours truly,
(Signed) J. R. HOLMAN,
Assistant General Manager."

Complainant's Exhibit A–G.

"Hoquiam, Wash. Sept. 29, 1910.

Mr. J. R. Holman,

Asst. Gen. Mgr. O. & W. Ry.

Seattle, Wash.

Dear Sir:—

Your favor of the 23rd inst., enclosing print of your drawing No. 262–H, is at hand.

I have taken the matter up with our committee, and we have studied the matter thoroughly and have decided that the best interests of all concerned require that you establish your center line Eighteen (18) feet north of the center line of Simpson Avenue produced, instead of Twelve and one-half (12½) feet, as indicated on your print. This will leave Thirteen (13) feet clearance from the north truss of your bridge to the north line of the avenue, which, in our opinion, should be ample. It will also leave the same clearance between the city bridge and the south line of the avenue.

It is the intention of the city to build a bridge with a Twenty-two (22) foot roadway clear and a sidewalk on the south side Eight (8) feet clear. [147]

Hoping that this arrangement will be satisfactory to you and looking forward to the speedy construction of both bridges, I remain,

Very truly yours,

_____,

JDM/OEH. City Engineer."

Complainant's Exhibit A–H.

"Seattle, September 30th, 1910.

Mr. J. D. Moughmer,
City Engineer,
Hoquiam, Washington.

Dear Sir:—

Your letter of the twenty-ninth instant simply reopens an old question which was settled in our agreement, which it is of no further benefit to discuss. We intend to comply strictly with our agreement and clear the center line of Simpson Avenue, placing our bridge so that the super-structure will be entirely North thereof. We will expect and of course prepare our plans on the assumption that you will likewise comply with this agreement.

We will have the maps ready for your inspection on Wednesday, October fifth, and would like to have you come up here and look over the maps with us.

Yours truly,
(Signed) J. R. HOLMAN,
Assistant General Manager."

Complainant's Exhibit A–I.

"Hoquiam, Wash., Oct. 1, 1910.

Mr. J. R. Holman,
Asst. Gen. Mgr. O. & W. Ry.
Seattle, Wash.

Dear Sir:—

Your letter of Sept. 30th at hand.

I am instructed by the Committee to say in reply that the location outlined in my letter of Sept. 29th and as shown on the accompanying blue-print is the

only one we will accept, and it will be useless for you to prepare your plans on any other basis.

It will not be convenient for me to come to Seattle upon the date you mention.

Very truly yours,

_____,

JDM/OEH. City Engineer." [148]

Complainant's Exhibit A–J.

"Seattle, October 3rd, 1910.

Mr. J. D. Moughmer,
City Engineer,
Hoquiam, Washington.

Dear Sir:—

I have your letter of the first instant, together with print you referred to, and I note that it will not be convenient for you to come to Seattle to look at the maps we have prepared to accompany the proposed applications to the War Department for permits for our respective bridges. Under these circumstances I am sending you herewith a print of the location map. These for your inspection and remarks.

Referring more particularly to the subject of the location of the railroad company's center line. It is our intention that this matter be finally and definitely disposed of by the agreement which was to the effect that the Railroad Company's bridge would be constructed with its superstructure entirely North of the center line of Simpson Avenue and the City's bridge constructed south of the center line of Simpson Avenue. At least this is our interpretation of that agreement, and if you do not concur I would

be glad to have the Committee point out where we are at variance. It seemed to me that it was thoroughly discussed and understood that the above would be the arrangement. If your Committee stands ready to contend that it shall dictate the location of the Railroad Company's bridge further than that outlined in the agreement, I would be pleased to be definitely so informed by them.

Yours truly,

(Signed) J. R. HOLMAN." [149]

Exhibits introduced in reply to defendant's testimony:

Copy of "Hoquiam Washingtonian," dated May 4, 1911, announcing joint user bridge contract between Northern Pacific Railway Company and Oregon-Washington Railroad & Navigation Company, and Chicago, Milwaukee & St. Paul Railway Company. This is the announcement referred to in the testimony of Mr. Bridges, and is material only so far as it shows announcement of the arrangement with the Northern Pacific on that date.

Complainant's Exhibit "B" is the copy of the contract between the Citizens' Committee, signed by McGlaughlin, Mourant and Moughmer, and Grays Harbor & Puget Sound Railroad Company, signed by Holman, under date of September 9, 1910, the substance of which exhibit is that the railway company would build a lift-bridge on one side of Simpson Avenue, and that the city and railway company will join in building the piers of sufficient length to enable the city to build a lift-bridge on the other side; the city to have the right to proceed with its con-

struction of the bridge whenever it chooses, but to join in the construction of the piers.

Complainant's Exhibit "A" is the record of a deed from the Grays Harbor & Puget Sound Railway Company to Oregon and Washington Railroad Company, under date of June 27, 1910, which deed, after specific description of property conveyed, contains the following:

"Also all and singular the right of way and other rights of every kind and character heretofore acquired or hereafter to be acquired in any manner whatsoever by the said Washington corporation in aid of any connection with the aforesaid railroad route, and any and all other railroad routes or rights of way of the Washington corporation in the State of Washington now or hereafter surveyed or located or hereafter to be acquired * * * . Subject, however, to any and all existing liens, and charges upon the said premises hereby conveyed, or any part thereof, all of which the Oregon corporation (the grantee) hereby assumes and agrees to pay." [150]

Complainant's Exhibit "C" is the record of a deed from the Oregon and Washington Railway Company to the Oregon-Washington Railroad & Navigation Company, dated December 23, 1910. Part of the description is as follows:

"All the railroad and telegraph lines of the vendor, together with all the rights, powers, immunities, privileges, franchises and all other property appertaining thereto, subject to the rights of the Chicago, Milwaukee & Puget Sound Railway Company relating to joint ownership * * * . All appropri-

ation of real estate and other property made by the vendor, and all suits, actions or rights of action instituted by the vendor for the condemnation of property for use in connection with any railroad of the vendor, or any branch or extension thereof. To have and to hold the above railroad, telegraph lines, franchises, rights, contracts and other property unto the vendee (Oregon-Washington Railroad & Navigation Company) and its successors and assigns. The vendee hereby assumes and agrees to keep and perform each and every of the contracts hereby assigned and transferred or intended to be assigned and transferred by the vendor to the vendee, and the vendor agrees to pay and discharge all the debts and liabilities, so that the property hereby conveyed shall be free from all debts and liabilities of the vendor." [151]

[Certificate to Abstract of Testimony and Order Making Same Part of Record.]

It appearing to the Court that the complainant, in accordance with the rules of this court, filed in this court an abstract of the testimony, a copy of which was upon the 28th day of February, 1914, served upon the defendants and each of them, in accordance with the rules of this court, and the defendants having examined said copy and served in due time upon the complainant certain amendments and corrections, which amendments and corrections have been accepted by complainant, and the original abstract having been corrected to conform thereto, and the parties having stipulated as to the correctness of said abstract, the Court does now certify that said

corrected abstract is a full, complete and correct abstract of all the testimony introduced by the parties on the hearing of said cause and constitutes all the substantial testimony therein material to the issue, and it is

ORDERED, That said abstract of testimony be and hereby is made a part of the record.

Dated April 2, 1914.

EDWARD E. CUSHMAN,
U. S. District Judge.

(Filed Apr. 2, 1914.) [152]

Assignment of Errors.

Now comes the appellant, the complainant in the District Court, and files its assignment of errors and says that the decree and order entered on the 22d day of November, 1913, is erroneous and unjust to complainant:

I.

Because the District Court failed to find and hold that that certain letter dated June 9, 1909, signed, in behalf of the defendant Grays Harbor & Puget Sound Railway Company, by H. F. Baldwin, and accepted by C. H. Jones in behalf of the complainant, Northwestern Lumber Company, together with the previous letters of the Northwestern Lumber Company under date of September 25, 1908, and October 2, 1908, constituted a binding contract upon the parties and obligated the defendant Grays Harbor & Puget Sound Railway Company, and its successors, Oregon and Washington Railroad Company and

Oregon-Washington Railroad & Navigation Company, to the performance of said contract.

II.

The District Court erred in excluding from consideration and refusing to give effect to the testimony of George H. Emerson and C. H. Jones, and other testimony cumulative in character, tending to show that, prior to and contemporaneously with the said letter of June 9, 1909, there was an understanding between the said complainant, Northwestern Lumber Company, and the said Grays Harbor & Puget Sound Railway Company to the effect that the complainant, Northwestern Lumber Company, should not be called upon to co-operate with the said Grays Harbor & Puget [153] Sound Railway Company in obtaining any franchise for crossing the Hoquiam River at Simpson Avenue which should not provide for a highway bridge at said crossing, provided that the city of Hoquiam would pay its just proportion of the cost.

III.

The Court erred in finding that the defendant Grays Harbor & Puget Sound Railway Company was justified in refusing and declining to sign the contract set forth in the complaint, which was signed and tendered by the complainant, in pursuance of the letter and acceptance thereof dated June 9, 1909.

IV.

The Court erred in finding that the defendant Oregon-Washington Railroad & Navigation Company, successor to the Grays Harbor & Puget Sound Railway Company, tendered full performance of the

contract between the parties on September 10, 1910, by declaring its willingness to pay on that date the sum of one hundred thirty-four thousand dollars ($134,000.00), without any additional sum for interest.

V.

The Court erred in holding that the expression of willingness by J. R. Holman, on September 10, 1910, to pay the sum of one hundred thirty-four thousand dollars ($134,000.00) constituted an offer and tender of performance by the defendant Oregon-Washington Railroad & Navigation Company and was sufficient in equity to relieve the said defendant of its contract obligation.

VI.

The Court erred in refusing to hold and find that the said defendant Oregon-Washington Railroad & Navigation Company, is estopped to claim release from said contract by [154] virtue of its offer to pay the sum of one hundred thirty-four thousand dollars ($134,000.00), on account of its failure thereafter to notify complainant of its intention to forfeit said contract, and by permitting the complainant to proceed with performance of the contract on its part at large expense and with full knowledge.

VII.

The Court erred in refusing to enter a decree in said cause requiring the defendants Grays Harbor & Puget Sound Railway Company, Oregon and Washington Railroad Company, and Oregon-Washington Railroad & Navigation Company to enter into the formal contract prepared jointly by the

complainant and attorneys and officers of said defendants and executed and tendered by the complainant.

VIII.

The Court erred in refusing to enter a decree for the specific performance of said contract, or, in the alternative, for damages for failing to perform.

IX.

The Court erred in dismissing the complaint.

WHEREFORE, the complainant and appellant prays that the order dismissing the complaint be reversed and the District Court be directed to enter a decree of specific performance in conformity with the prayer of the bill, or in the alternative, directing the District Court to find and determine the complainant's damages by reason of the defendant's failure to perform their contract, and to enter judgment against the defendants therefor.

B. S. GROSSCUP,
W. C. MORROW,
Solicitors for Complainant.

(Filed Feb. 21, 1914.) [155]

Petition for Appeal.

To the Honorable EDWARD E. CUSHMAN, Judge:

The above-named complainant, feeling itself aggrieved by the decree made and entered in this cause on the 23d day of November, 1913, does hereby appeal from the said order and decree to the Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of error which

is filed herewith, and it prays that its appeal may be allowed and that citation issue as provided by law, and that the transcript of the record, proceedings and papers upon which said appeal is based, duly authenticated, may be sent to the Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California; and your petitioner further prays that the proper order touching security to be required of it to perfect its appeal be made.

B. S. GROSSCUP,
W. C. MORROW,
Solicitors for Petitioner.

Order [Granting Petition for and Allowing Appeal].

The foregoing petition is granted and the appeal allowed upon giving bond, conditioned as required by law, in the sum of five hundred dollars ($500.00).

Dated February 21, 1914.

EDWARD E. CUSHMAN.

(Filed Feb. 21, 1914.) [156]

Bond for Appeal.

IT IS STIPULATED: That we, Northwestern Lumber Company, as principal, and J. J. Hewitt as surety, acknowledge ourselves to be jointly bound unto Grays Harbor & Puget Sound Railway Company, Oregon and Washington Railroad Company, Oregon-Washington Railroad & Navigation Company, and Chicago, Milwaukee & Puget Sound Railway Company, defendants and appellees in the above cause, in the sum of FIVE HUNDRED DOLLARS ($500.00), conditioned that, whereas, in the District

Court of the United States for the Western District of Washington, on the 22d day of November, 1913, in a suit depending in that court, wherein Northwestern Lumber Company was complainant, and the above-entitled obligees were defendants, numbered on the Equity Docket No. 1866–C, a decree was rendered dismissing the bill of the complainant, and the complainant having petitioned an appeal from the said decree and order, and having filed a copy thereof in the office *of the office* of the Clerk to reverse the said decree, and a citation directed to the said defendants and appellees, admonishing and directing them to appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, in the State of California.

NOW, if the said appellant, Northwestern Lumber Company, shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation shall be void; else to remain in full force and effect.

If any condition hereof be *reached,* the Court may upon ten days' notice to the sureties proceed summarily herein to ascertain the amount due, to render judgment, and to award execution therefor.

NORTHWESTERN LUMBER COMPANY.

By C. H. JONES, [Seal]

Its President.

C. H. JONES,

J. J. HEWITT,

Surety. [157]

Order Approving Bond.

The above bond having been presented to me, and having been examined by me, the same is approved, both as to form and sufficiency.

EDWARD E. CUSHMAN,
U. S. District Judge.

(Filed Feb. 21, 1914.)

Western District of Washington,
Southern Division,
County of Pierce,
State of Washington,—ss.

J. J. Hewitt and C. H. Jones, sureties named in the foregoing bond, being duly sworn each for himself says: I am a resident and a householder within the Western District of Washington, and am worth the sum of Five Hundred Dollars over and above all my debts and liabilities, exclusive of property exempt from execution.

C. H. JONES.
J. J. HEWITT.

Subscribed and sworn to before me this 20th day of February, 1914.

[Notarial Seal] W. C. MORROW,
Notary Public in and for the State of Washington,
Residing at Tacoma. [158]

In the United States District Court for the Western District of Washington, Southern Division.

No. 1866—C.

NORTHWESTERN LUMBER COMPANY, a Corporation,

Complainant,

vs.

GRAYS HARBOR & PUGET SOUND RAILWAY COMPANY et al.,

Defendants.

Praecipe for Record.

To Frank L. Crosby, Clerk United States District Court, Western District of Washington:

In the above-entitled cause you are directed to prepare, certify and forward to the Circuit Court of Appeals for the Ninth Circuit, as the record in said cause, the following papers and none other; and that in preparing such record you omit from all papers, excepting the copy of this praecipe, all captions, verifications, and other endorsements, excepting only the name of the paper and a notation as to the date of its filing:

1. Bill of complaint.
2. Demurrer to bill.
3. Opinion of Honorable Frank Rudkin overruling demurrer.
4. Answer of deft. Ore.-Wash. Rd. & N. Co.
5. Opinion of Honorable Edward E. Cushman, District Judge.
6. Final decree of dismissal.

7. Abstract of testimony and certificate of Judge.
8. Assignments of error.
9. Petition for appeal and allowance.
10. Bond on appeal and approval.

B. S. GROSSCUP,
Solicitors for Complainant.

(Filed April 3, 1914.) [159]

[Certificate of Clerk U. S. District Court to Transcript of Record, etc.]

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk United States District Court for the Western District of Washington, do hereby certify and return that the foregoing pages *number* from 1 to 160, inclusive, contain a full, true and correct transcript of the record and proceedings in the case of Northwestern Lumber Company vs. Grays Harbor & Puget Sound Railway Company et al., lately pending in this court, as required by the praecipe of counsel filed in said cause, as the originals thereof appear on file in this court at the city of Tacoma, in the District aforesaid.

I further certify and attach hereto the original Citation, and original order extending time to May 18th, 1914, for filing transcript of record.

I further certify that the cost of certifying the foregoing transcript amounted to the sum of $133.30, which amount has been paid to the Clerk by the solicitor for appellant.

ATTEST my official signature and the seal of this court, at Tacoma, in said District, this 11th day of May, A. D. 1914.

[Seal] FRANK L. CROSBY,
Clerk.
By E. C. Ellington,
Deputy Clerk. [160]

In the District Court of the United States, for the Western District of Washington, Southern Division.

No. 1866—C.

NORTHWESTERN LUMBER COMPANY,
Complainant,

vs.

GRAYS HARBOR & PUGET SOUND RAILWAY COMPANY, OREGON AND WASHINGTON RAILROAD COMPANY, OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, and CHICAGO, MILWAUKEE & PUGET SOUND RAILWAY COMPANY,
Defendants.

Citation [on Appeal (Original)].

United States of America to Grays Harbor & Puget Sound Railway Company, Oregon and Washington Railroad Company, Oregon-Washington Railroad and Navigation Company, and Chicago, Milwaukee & Puget Sound Railway Company, Greeting:

YOU ARE HEREBY NOTIFIED, that in a cer-

tain case in equity in the United States District Court in and for the Western District of Washington, Southern Division, wherein Northwestern Lumber Company is complainant and Grays Harbor & Puget Sound Railway Company, Oregon and Washington Railroad Company, Oregon-Washington Railroad & Navigation Company, and Chicago, Milwaukee & Puget Sound Railway Company are defendants, an appeal has been allowed the complainant therein to the United States Circuit Court of Appeals for the Ninth Circuit. You are hereby cited and admonished to be and appear in said court at San Francisco, California, thirty days after the date of this citation, to show cause, if any there be, why the order and decree appealed from should not be corrected and [161] speedy justice done the parties in that behalf.

WITNESS the Honorable E. E. CUSHMAN, Judge of the United States District Court for the Western District of Washington, this the 3d day of April, A. D. 1914.

[Seal] EDWARD E. CUSHMAN,
U. S. District Judge. [162]

We hereby acknowledge due service of the foregoing Citation on Appeal by receipt of a true copy of the same this 4th day of April, 1914, and do waive further service for and on behalf of each of the defendants and appellees herein named.

BOGLE, GRAVES, MERRITT & BOGLE,
Solicitors for Grays Harbor & Puget Sound Railway Company, a Corporation, Oregon and Washington Railroad Company, a Corporation, Oregon-Washington Railroad and Navigation Company,

a Corporation, and Chicago, Milwaukee & Puget Sound Railway Company, a Corporation, Defendants and Appellees.

[Endorsed]: No. 1866–C. In the United States District Court, Western District of Washington. Northwestern Lumber Company, Complainant, vs. Grays Harbor & Puget Sound Railway Company et al., Defendants. Citation.

[Endorsed]: No. 2423. United States Circuit Court of Appeals for the Ninth Circuit. Northwestern Lumber Company, a Corporation, Appellant, vs. Grays Harbor & Puget Sound Railway Company, a Corporation, Oregon and Washington Railroad Company, a Corporation, Oregon-Washington Railroad & Navigation Company, a Corporation, and Chicago, Milwaukee & Puget Sound Railway Company, a Corporation, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Received and filed May 14, 1914.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1866—C.

NORTHWESTERN LUMBER COMPANY,
Appellant,

vs.

GRAYS HARBOR & PUGET SOUND RAILWAY COMPANY et al.,
Appellees.

Order Extending Time [to May 18, 1914, to File Record on Appeal].

For good cause shown, IT IS NOW ORDERED that the time within which the record on appeal in the above cause may be filed in the Circuit Court of Appeals in San Francisco, California, is hereby extended to and including May 18th, 1914.

Dated April 30, 1914.

EDWARD E. CUSHMAN,
Judge. **[163]**

[Endorsed]: No. 1866–C. In the District Court of the United States for the Western District of Washington, Tacoma. Northwestern Lumber Company, Appellant, vs. G. H. & P. S. Ry. Co. et al., Appellees. Order Extending Time. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Apr. 30, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.